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IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

No.

CITIES SERVICE COMPANY
CITIES SERVICE OIL COMPANY,
Petitioners

v.

FEDERAL ENERGY ADMINISTRATION
FRANK G. ZARB, ADMINISTRATOR,
Respondents

PETITION FOR A WRIT OF CERTIORARI TO THE TEMPORARY EMERGENCY COURT OF APPEALS OF THE UNITED STATES

Petitioners Cities Service Company and Cities Service Oil Company, a wholly owned subsidiary of Cities Service Company, respectfully pray that a writ of certiorari issue to review the judgment of the Temporary Emergency Court of Appeals entered on December 31, 1975.

OPINION BELOW

The opinion of the Temporary Emergency Court of Appeals, not yet reported, appears in the appendix hereto, p. 1a, infra. The findings of fact and conclusions of law of the U. S. District Court for the District

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of Columbia entered on July 10, 1975, appears at appendix p. 24a, infra.

JURISDICTION

The judgment of the Temporary Emergency Court of Appeals was entered on December 31, 1975. Pursuant to Rule 6 of the Temporary Emergency Court of Appeals, petition for rehearing was timely filed on January 14, 1976, together with petitioners' motion for stay of mandate. The latter motion was granted on January 14, 1976. Petition for rehearing was denied on January 28, 1976. This Court has jurisdiction under section 211(g) of the Economic Stabilization Act of 1970, as amended, 85 Stat. 750, 12 U.S.C. § 1904 note (Supp. 1975), which is incorporated by section 5(a)(1) of the Emergency Petroleum Allocation Act of 1973, 87 Stat. 633, 15 U.S.C. § 754(a)(1), and under 28 U.S.C. § 1254(1).

QUESTIONS PRESENTED

1. Whether the Cost Equalization Program instituted by respondents, 10 C.F.R. § 211.67, constitutes a tax, which may not be exacted by an administrative agency.
2. Whether petitioners suffer a taking of private property without just compensation in violation of the Fifth Amendment to the U. S. Constitution by a regulation which requires that petitioners each month make cash payments directly to other refiners where the regulation mandating such cash payments contains no provision which secures to petitioners compensation for or recovery of such cash payments.
3. Whether the Emergency Petroleum Allocation Act, 87 Stat. 627, 15 U.S.C. §§ 751-756, which

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authorizes and directs the Federal Energy Administration to provide by regulation for the mandatory allocation of crude oil and refined petroleum products at prices to be specified in such regulation authorizes the agency to require, under pain of criminal fine and civil penalty, payments of cash from petitioners to other refiners to "entitle" petitioners to process certain crude oil already owned by petitioners.

CONSTITUTIONAL PROVISIONS, STATUTES AND REGULATIONS INVOLVED

This case involves Article I, Section 8, Clause 1, Constitution of the United States and the Fifth Amendment to the Constitution of the United States as well as sections 4(a) and 4(b)(1) of the Emergency Petroleum Allocation Act of 1973, as amended, and certain administrative regulations, viz., 10 C.F.R. §§ 211.62 and 211.67. The foregoing are reprinted at appendix pp. 38a-51a, infra.

STATEMENT OF THE CASE

The Two-Tier Price System for Crude Oil

In August 1973, as part of an effort to control widespread inflation, the President through the Cost of Living Council (CLC) implemented Phase IV of the Economic Stabilization Program, a mandatory program of price and wage controls covering most sectors of the U. S. economy including the petroleum industry. Beginning in 1973 the petroleum industry was characterized by rapidly rising world prices which had surpassed the domestic price of oil and growing U. S. dependence on foreign sources of oil. In consequence, the Phase IV petroleum regulations involved a mix-

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ture of inflation control and price incentive to encourage new domestic production of crude oil.

For crude oil, CLC instituted a two-tier price system under which a ceiling price was established for production classified as "old" oil while all other domestic production, classified as "new," "released," and "stripper" oil was not subject to price control and thus could be sold at the free market price. "Old" oil was defined as crude oil produced from a property up to that property's 1972 base production level. "New" oil was oil produced in excess of the property's 1972 base production level. "Released" oil was an equivalent amount of old oil for every "new" barrel produced, such old oil thus being released for sale at the free market price. "Stripper" well oil was oil from wells which produce less than ten barrels per day. See generally 38 Fed. Reg. 22536 et seq. (August 22, 1973).

The free market price was chiefly influenced by prices for oil imported from the Middle East which were increasing sharply. Thus, for example, the price of Arabian light crude, a representative foreign crude oil, had increased from approximately $3.07 per barrel in August 1973 to approximately $11.65 in January 1974. Par. 14, Affidavit of FEA Associate Assistant Administrator Vernon (hereinafter "Vernon Affidavit"), Stipulated Record on Appeal, 330 (hereinafter "Record"). By contrast the ceiling price for old oil was established by CLC at approximately $5.25 per barrel on December 19, 1973, and remains at that level. Ibid.

In October 1973, following outbreak of the Arab-Israeli conflict, an embargo against the United States and certain other countries resulted in sharp reduction

of exports of Arab oil to the United States. In response to the resulting shortages Congress on November 27, 1973, enacted the Emergency Petroleum Allocation Act, 87 Stat. 627, 15 U.S.C. §§ 751-756 (hereinafter "the EPAA"), authorizing and directing the President to promulgate a regulation providing for mandatory allocation of crude oil, residual fuel oil, and refined petroleum products at prices to be specified in or determined by such regulations. § 4(a), 87 Stat. 629, 15 U.S.C. § 753(a). By Executive Order 11748 dated December 4, 1973, there was established in the Executive Office of the President the Federal Energy Office (FEO) under the direction of an Administrator to whom was delegated all authority vested in the President by Congress in the EPAA. 38 Fed. Reg. 33575 (December 6, 1973). FEO on January 14, 1974, promulgated regulations in implementation of the EPAA which adopted and continued the two-tier pricing system for domestic crude oil previously established by CLC. 39 Fed. Reg. 1923 et seq. (January 15, 1974).

Other Measures Stemming from the Two-Tier System

By reasoning of increasing free market prices, the Federal Energy Administration (FEA)[1] conceived that the competitive viability of small and independent refiners was threatened. The problems noted by FEA were that (1) operating costs and capital expenditures of small refiners had traditionally been higher than those of competitors and this condition

[1] FEA was established by Congress on June 27, 1974, as an independent agency in the executive branch, succeeding to the authority and responsibility of FEO. Federal Energy Administration Act, 88 Stat. 97, 15 U.S.C. §§ 761-766. See Executive Order 11790, 39 Fed. Reg. 23185 (June 27, 1974).

was exacerbated by the two-tier cost disparity; (2) small refiners had traditionally marketed their products at a lower price than those of major branded refiners; (3) many small and independent refiners were placed in a severe cost-price squeeze; (4) many small and independent refiners were unable to absorb the full amount of their increased crude costs; and (5) many small and independent refiners were required to charge higher prices for products than their competitors and suffered loss of market share on account of such higher prices.[2]

In an attempt to alleviate such distortions FEA and its predecessor FEO took three steps. First, it issued on January 14, 1974, its so-called "December 1" rule, 10 C.F.R. § 211.64 (now 10 C.F.R. § 211.63(a)), which provides in substance that supplier/purchaser relation-

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[2] FEA specifically stated its concern as follows:

"To meet competition, however, many refiners and marketers (with higher input costs) had to endure a severe cost-price squeeze. Many small and independent refiners and independent marketers—unable to absorb the full amount of such costs—were required to charge higher prices for their products with a consequential loss of market shares." Par. 17, Vernon Affidavit, Record, 331.

"Moreover, since independent marketers and many small and independent refiners were disadvantaged by this development, the distortion threatened the competitive viability of the independent sector of the petroleum industry." Par. 18, Vernon Affidavit, Record, 332.

"FEA believes that a bias is necessary to compensate relatively small refiners for higher operating costs, proportionately greater capital expenditure requirements, and the fact that such refiners must, in many cases, market their products at a lower price than the products of the major branded refiners." 39 Fed. Reg. 39741-742. (November 11, 1974).

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ships in effect for sales, purchases and exchanges of domestic crude oil on December 1, 1973, shall remain in effect for the duration of the crude oil allocation program. By freezing all crude oil supplier/purchaser relationships as of December 1, FEO sought to prevent moves by major integrated refiners to divert low-cost old oil to their own refineries. Pars. 8, 19, Vernon Affidavit, Record, 326, 332. The December 1 rule is an appropriate exercise of FEA's authority to allocate crude oil.

A second step designed to correct supply imbalance and to grant small and independent refiners access to the benefits of price-controlled old oil was the Mandatory Crude Oil Sales program, 10 C.F.R. § 211.65, effective February 1, 1974. The purpose of this so-called "buy/sell program" was to assure each small and independent refiner preferential allocations such that they obtained volumes of crude oil not less than volumes obtained during 1972. Sales to small and independent refiners are made by the fifteen largest U.S. refiners which are neither "small" nor "independent" within the meaning of those terms as set forth in section 3 of the EPAA. Buy/sell program sales are made at a refiner/seller's weighted average crude oil price thereby giving small and independent refiners some access to the benefits of price-controlled old oil and thus lessening to some extent the crude cost disparities among refiners. The buy/sell program is also within respondents' authority to allocate crude oil.

Not satisfied that these measures would maintain the competitive viability of small and independent refiners, FEA next embarked upon a far-reaching program of cost equalization which goes beyond allocation authority and which gives rise to this litigation.

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The Cost Equalization Program

On August 18, 1974, FEA issued a notice of proposed rulemaking entitled "Allocation of Old Oil." 39 Fed. Reg. 31650 et seq. (August 30, 1974). Under the proposal certain refiners would be directed to make cash payments in the nature of a subsidy to other refiners. As stated by FEA, "The proposed is intended to give all refiners the financial benefits associated with access to supplies of old oil by, in effect, allocating old oil to each refiner in such a way so as to give such refiner its proportionate share of total domestic supplies of old oil." 39 Fed. Reg. at 31650. In justification of the program the Supplementary Affidavit of John Vernon submitted by respondents in the trial court states: "When the excessive profits reported by major integrated oil companies in the recent past are contrasted with the serious economic problems facing many small and independent refiners and independent marketers as a result of high input costs they are not able to pass through . . . FEA believes that the need for the equal allocation of 'old' oil and resulting equalization of input costs becomes clear and is unquestionably in the public interest." Par. 13, Supplementary Affidavit of John Vernon, Confidential Record, 55.

The mechanics of the cost equalization program (hereinafter "the CEP") are that each month FEA calculates a ratio known as the national old oil supply ratio. The ratio is determined by comparing total old by multiplying that refiner's runs to stills for the month to total crude oil runs to stills (crude oil processed) for all refiners for the month. The number of entitlements issued to a particular refiner is then determined by multiplying that refiner's runs to stills for the month by the national old oil supply ratio. Thus, for example,

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if total old oil receipts nationally amount to forty percent of total runs to stills, then a refiner having run 100,000 barrels per day in that month would be issued entitlements by FEA permitting it to include in its old oil receipts for the month 40,000 barrels per day of old oil. If, in fact, the refiner's actual receipts of old oil were less than 40,000 barrels per day the refiner would be listed in the FEA notice as a seller of entitlements for the difference. On the other hand, if the refiner's actual receipts of old oil for the month exceeded 40,000 barrels per day, it would then be required to purchase (from an entitlements seller) the right to include in receipts the excess old oil.

The CEP issued as a final rule by FEA on November 29, 1974. 10 C.F.R. § 211.67, 39 Fed. Reg. 42246 (December 4, 1974). The first month for which entitlements issued was November 1974 and on January 10, 1975, FEA published its notice wherein FEA issued entitlements for the month of November 1974. 40 Fed. Reg. 2560 (January 13, 1975). Petitioners were listed in the notice as having more old oil receipts than entitlements thereby requiring purchase by petitioners of 699,089 entitlements at $5 each, subject to non-compliance sanctions in the form of criminal fines and civil penalties.

In each succeeding month respondents have published entitlement notices and each notice has required petitioner to purchase rights to include old oil in petitioners' crude oil receipts. For the first thirteen months of the CEP, November 1974 through November 1975, petitioners have been required to purchase a total of 14,934,556 entitlements at a total cost of $109,942,176.62. The CEP has been and will continue for

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the foreseeable future to be a major part of the energy program implemented by respondents.

The Instant Litigation

In the District Court and subsequently in the Temporary Emergency Court of Appeals, petitioners challenged the legality of the CEP as applied to them on both constitutional and statutory grounds. Jurisdiction of the District Court was founded on section 5(a)(1) of the EPAA, which incorporates sections 205-211 of the Economic Stabilization Act, as amended, 85 Stat. 750, 12 U.S.C. § 1904 note (Supp. 1975). Petitioners argued that the CEP is patently unconstitutional because it constitutes an administratively imposed tax in violation of Article I, Section 8, Clause 1 of the Constitution as well as a taking of private property without just compensation in violation of the Fifth Amendment and asserted also that the CEP exceeded statutory authority because it constitutes neither allocation nor the establishment of prices. As a factual matter petitioners argued that they were seriously injured by the CEP because the program merely affords a prospect of recovery from the marketplace of sums required to be transferred to other refiners. For the first four months of the CEP petitioners had been required to make entitlement payments totaling $23.9 million but had not recovered such sums from the marketplace.

REASONS FOR GRANTING THE WRIT OF CERTIORARI

The question raised in this proceeding is whether a federal administrative agency may require one person to subsidize another by direct cash payments for the purpose of maintaining and financing the competitive viability of the person subsidized. Petitioners are justi-

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fied in invoking the certiorari powers of this Court for the reason that, in answering in the affirmative the question set forth above, the court below has gone beyond prior decisions of this Court in assessing the permissible scope of the regulatory powers of an administrative agency and in approving the CEP in light of limits imposed by Article I, Section 8, Clause 1 of the Constitution and the Fifth Amendment thereto. This case therefore calls for exercise of this Court's power to reconfirm or redefine powers which may be exercised by and through administrative agencies. The precise issues can best be stated in the form of three questions arising from the decision below.

1. Does the CEP Constitute the Exaction of a Tax by an Administrative Agency?

This case presents difficult and important questions concerning whether the exaction of money payments by an administrative agency to support an alleged public purpose constitutes the imposition of a tax. May an administrative agency mandate cash payments from one sector of an industry to another and justify such action, having the essential characteristics of a tax, as a regulatory measure? The contours of such novel power in an administrative agency should be charted by this Court. If the CEP is valid then an administrative agency may exact monetary payments from one group directly to another and justify the action by ascribing to it a regulatory effect.

The facts of this case present a classic situation in which a sector of the national economy is faced with economic hardship due to forces over which it has little control. The public interest in preservation of that disadvantaged sector demands that it not fail. As

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most frequently has been the case the solution involves subsidies for those enterprises comprising the disadvantaged sector. Invariably the subsidies, such as those for fishing vessels, the merchant marine, and airplane manufacturers, have been appropriated from public funds generated by taxes levied by Congress. Here, for the first time, an administrative agency has usurped the authority of Congress to raise the money to support the subsidy.

By Article I, Section 8, Clause I of the Constitution it is Congress that has the "power to lay and collect Taxes." Taxation is thus a legislative function and, as recently reaffirmed by this Court, Congress is "the sole organ for levying taxes." *National Cable Television Ass'n* v. *United States,* 415 U.S. 336, 340 (1974). If the exaction of a tax may be delegated by Congress, then plainly there has been a failure by Congress to lay down in the EPAA an intelligible principle to which respondents are directed to conform. *National Cable Television Ass'n* v. *United States, supra;* cf. *Hampton & Co.* v. *United States,* 276 U.S. 394 (1928).

The CEP constitutes a direct and involuntary monetary exaction imposed on petitioners for the direct benefit of other refiners. Indeed, since inception of the CEP in November 1974 through November 1975, petitioners have been required to transfer to other refiners direct cash payments aggregating $109,942,176.62 for the purchase of 14,934,556 entitlements. During the same period all buyers of entitlements made direct cash transfers to other refiners in a total amount of $1,524,424,457.08.

Regardless of a designation given it, an exaction will be classified by its purpose and operation. *United*

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States v. *Constantine*, 296 U.S. 287 (1935). The purpose of the entitlements program, as stated by respondents, is

> [T]o give all refiners the financial benefits associated with access to supplies of old oil by, in effect, allocating old oil to each refiner in such a way so as to give such refiner its proportionate share of total domestic supplies of old oil.

39 Fed. Reg. 31650 (August 30, 1974). In operation, the CEP mandates petitioners to purchase the right to process quantities of domestic crude oil already owned.

The court below held that the CEP was not a tax because it does not raise money for the government or for its support and because the object of the scheme is regulation. In this respect the court held that the CEP regulates "refiners' access to crude oil" and is thus a regulatory measure. That determination does not survive analysis. The scheme is offered as an allocation measure but it accomplishes results that allocation cannot properly achieve. Thus, while petitioners may be required to sell old oil at the controlled price, they cannot be forced to purchase oil at the higher, free market price. In effect the CEP requires such a purchase and serves no purpose other than to distribute to other refiners the financial benefits associated with petitioners' property.[3] In contrast to regulation as normally understood, the CEP neither encourages, discourages, restricts or deters activity. It simply man-

[3] Entitlement payments are not sanctions as were the penalty payments in *Moon* v. *Freeman*, 379 F.2d 382 (9th Cir. 1967); *United States* v. *Stangland*, 242 F.2d 843 (7th Cir. 1957); and *Rodgers* v. *United States*, 138 F.2d 992 (6th Cir. 1943), cited by the court below. It is well settled that Congress may establish a sanction and delegate to an agency authority to declare the type of

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dates cash payments by petitioners to other refiners. The condition which triggers the exaction is the receipt by petitioner of certain crude oil for processing. In *Cincinnati Soap Co.* v. *United States,* 301 U.S. 308 (1937), an excise tax imposed by Congress upon the first domestic processing of coconut oil was challenged by petitioners as not a true tax but a regulatory measure outside the field of federal power. The Court disposed of the contention holding that the exaction was purely an excise tax upon a manufacturing process for revenue purposes "and in no sense a regulation of the process itself." 301 U.S. at 312.

The sheer size of the monetary exactions in the instant case is persuasive that the CEP is designed to raise revenue in order to fund the subsidy deemed to be necessary for the continued viability of a segment of the petroleum industry. If this be a public purpose then funds for administration of such a program should come from the general fund of the treasury. It strains the imagination to attribute any purpose to the CEP other than the raising of revenue. The monetary exaction imposed on petitioners is not merely an incidental feature but plainly the essential feature of the scheme. The instant case squarely presents the important question whether such an administrative scheme is permissible.

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activity which merits the sanction. E.g., *Grimaud* v. *United States,* 220 U.S. 506 (1911). Unlike those cases, which involved administrative imposition of monetary sanctions imposed by Congress, the entitlement payments here are established by respondents. Moreover, entitlement payments have nothing to do with enforcement of the CEP which is effectuated instead through the fine and penalty sanctions established by Congress. See § 5(a)(1), Emergency Petroleum Allocation Act, 87 Stat. 633, 15 U.S.C. § 754(a)(1).

2. Does the CEP Constitute a Taking of Private Property Without Just Compensation in Violation of the Fifth Amendment?

The Fifth Amendment to the U.S. Constitution proscribes the taking of "private property . . . for public use, without just compensation." In contradistinction to "just compensation," which has been interpreted by this Court to mean "reasonable, certain, and adequate provision for obtaining compensation," *Regional Rail Reorganization Act Cases*, 419 U.S. 102, 124-125 (1974), "taking" has never admitted of a ready definition. Some governmental actions result in a direct appropriation of private property, while other actions merely generate indirect, consequential loss of private property. The question as to whether the loss is direct and thus a taking, or incidental and therefore beyond the scope of constitutional protection, has continually troubled this Court. As noted in *Armstrong* v. *United States*, 364 U.S. 40 (1960):

> This case and many others reveal the difficulty of trying to draw the line between what destructions of property by lawful governmental actions are compensable "takings" and what destructions are "consequential" and therefore not compensable.

364 U.S. at 48. Given a governmental regulation that admittedly has an adverse effect on private property, how attenuated must the injury be to be rendered incidental or consequential, as distinct from direct? Lacking a rule of general applicability, this Court has tailored *ad hoc* guidelines based on unique factual premises placed before it in discrete cases. E.g., *Armstrong* v. *United States, supra*, (acquisition by government of materials subject to unperfected materialmen's

lien held a taking); *United States* v. *Kansas City Life Ins. Co.*, 339 U.S. 799 (1950) (destruction of agricultural value of land by raising water table held a taking); *United States* v. *Causby*, 328 U.S. 256 (1946) (low and frequent airplane flights that interfere with enjoyment and use of land held a taking); *United States* v. *General Motors Corp.*, 323 U.S. 373 (1945) (condemnation of right of temporary occupancy of leased premises held a taking).

This case presents the Court with its first opportunity to determine (a) whether a regulatory scheme such as that described herein constitutes a taking for a public purpose, and (b) whether petitioners have been given their constitutional due of reasonable, certain, and adequate provision for compensation. Were this case merely an aberration, the fact that it is one of first impression might not, in itself, warrant the grant of certiorari. The distinguishing characteristic of the CEP, however, is its seductive simplicity and the prospect that it may well serve as a model for future programs that purport, though "equalization of costs" in a sector of the economy, to serve a regulatory purpose. Viewed in this light, the opinion of the court below, which goes beyond any prior precedent in sanctioning a confiscatory program of expropriation without just compensation, merits the attention of this Court.

The undisputed facts herein are that petitioners have been required to pay huge sums of money to competing refiners on a monthly basis. Respondents argue that such action is sanctioned by a statute which provides that crude oil shall be allocated at prices specified by regulation. Yet the questions remain, does a taking for a public use occur where petitioners are

required to pay direct cash subsidies to competing refiners for the privilege of processing oil already owned by petitioners? Assuming that a public purpose obtains, have petitioners received just compensation where they are told they *might* recover their costs in the market at some future, unspecified date, but given no guarantee of same? These questions have yet to be addressed by this Court. This case presents the issues squarely and they should be met.

3. Was Resort by the Court Below to General Congressional Objectives in Order to Sustain the CEP Proper When the Enabling Provision of the EPAA, Relied Upon by Respondents to Justify the CEP, Did Not Explicitly or Implicitly Authorize the Program?

In addition to challenging the CEP as unconstitutional, petitioners also asserted in the court below that the CEP is in excess of statutory authority. If statutory authority therefor exists, it must be found within section 4(a) of the EPAA. It is that section of the EPAA which vests the executive with the specific means to accomplish the litany of objectives set forth by Congress in section 4(b)(1). The court below characterized this argument as a "misinterpretation of Section 4(a) of the Allocation Act" and as an unreasonable "bifurcation of the authority conferred on the FEA under Section 4(a) from the objectives of 4(b)." Appendix, pp. 8a, 9a, infra. The court below held instead that "authority under Section 4(a) must be read together with the objectives which the exercise of that authority is to obtain." Ibid. This interpretation is manifestly improper.

While the specific means or powers bestowed by Congress on an agency may be exercised to achieve the

objectives to be accomplished by a statute, whether agency action is permissible must depend upon whether such action is channeled through the powers conferred and not whether particular action might attain a stated objective. Accordingly, respondents' authority under section 4(a) may not expand, accordion-like, to accomplish the objectives laid down in section 4(b)(1) as if respondents had been authorized to "take such action as necessary" to accomplish such broad, virtually unlimited objectives as protection of "national defense." EPAA, § 4(b)(1)(A), 87 Stat. 629, 15 U.S.C. § 753 (b)(1)(A).[4] To the contrary, section 4(a) authorizes regulations providing for mandatory allocation of covered products at prices to be specified in the regulations, and thus respondents are limited to allocation and price regulation in seeking to accomplish congressional objectives.

This is the view of the case taken both by petitioners and respondents in the District Court and before the Temporary Emergency Court of Appeals and, indeed, considerable effort was made by both sides in arguing that the CEP does or does not constitute allocation or price control. Remarkably, the court below did not

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[4] Indeed, section 102 of S. 1570 as reported by the Senate Committee on Interior and Insular Affairs provided that "In implementing the authority granted under this Act the President shall *take such actions as are necessary* to achieve the following specific objectives . . . ." S. Rep. No. 53-159, 2 (1973) (Emphasis added.) The foregoing was deleted in the committee of conference and the conference substitute generally followed the provisions of the House amendment. H. Rep. No. 93-628, 11 (1973). As eventually enacted, section 2(b) of the EPAA provided that "The purpose of this Act is to grant to the President of the United States and direct him to exercise *specific* temporary authority to deal with shortages of crude oil . . . ." § 2(b), 87 Stat. 628, 15 U.S.C. § 751(b). (Emphasis added.)

decide that crucial question, resorting instead to a bottom-line determination that the CEP is "clearly within the authority conferred on the FEA under the Allocation Act" because petitioners' "insistence upon the bifurcation of the authority conferred on the FEA under Section 4(a) from the objectives of 4(b), in their endeavor to assert the lack of specific authority under the Allocation Act is unwarranted and unreasonable." Appendix, p. 9a, infra.

The CEP is neither an exercise of allocation nor price authority because it yields results that allocation and price regulation could not yield. Thus while petitioners may be mandated to sell crude oil at the controlled price they may not be forced to purchase high-priced crude oil. Respondents argue that the CEP is an exercise of allocation authority because the program achieves the "same result" as a physical transfer of crude oil. It is thus argued by respondents that under a physical allocation program FEA could have directed each refiner with more than its proportionate share of old oil to transfer its excess barrels to a less favored refiner in exchange for an equal number of barrels of uncontrolled crude oil with the seller of old oil charging approximately $5.25 per barrel and the seller of uncontrolled oil charging the free market price. Par. 22, n., Vernon Affidavit, Record, 334. But plainly this justification is unsound because there is not, and could not properly be, any authority in the EPAA to permit FEA to mandate a forced purchase of crude oil. It is inconceivable that Congress contemplated that persons for whose protection the EPAA was enacted, viz., purchasers at equitable prices, be forced to purchase covered products allocated to them. Indeed, respondents' own decisions have uniformly held that the

FEA regulations do not prohibit any purchaser from declining to purchase an allocated product from any supplier. *Jacksonville Electric Authority,* 2 FEA ¶80,533, CCH Federal Energy Guidelines (March 21, 1975); *Swann Oil, Inc.,* 2 FEA ¶80,505 (January 9, 1975); *Jacksonville Electric Authority,* 2 FEA ¶83,008 (January 9, 1975); *Better Home Heat Council, Inc.,* as modified, CCH Federal Energy Guidelines, ¶20,131 (July 24, 1974). Yet it is evident that a physical transfer of old oil for uncontrolled oil could yield the results obtained under the substitute CEP only if a refiner can be forced to purchase high-priced crude oil. Accordingly, petitioners submit that the CEP accomplishes more than allocation or price control could accomplish and is therefore in excess of authority.

CONCLUSION

For the foregoing reasons this petition for writ of certiorari should be granted.

Respectfully submitted,

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Dated: February 27, 1976

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APPENDIX

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APPENDIX

Opinions Below

TEMPORARY EMERGENCY COURT OF APPEALS
OF THE UNITED STATES

No. DC-34

CITIES SERVICE COMPANY AND CITIES SERVICE OIL COMPANY,
Plaintiffs-Appellants,

GULF OIL CORPORATION, EXXON CORPORATION, MARATHON OIL COMPANY AND HUNT OIL COMPANY, *Amici Curiae,*

v.

FEDERAL ENERGY ADMINISTRATION AND FRANK G. ZARB,
Defendants-Appellees,

and

ASHLAND OIL, INC., *Amicus Curiae.*

(FILED DECEMBER 31, 1975)

Appeal from the United States District Court
for the District of Columbia

(Civ. 75-0653)

Before CHRISTENSEN, ESTES, and JOHNSON, *Judges.*
ESTES, *Judge.*

This suit was commenced in the United States District Court for the District of Columbia by Cities Service Company and its wholly-owned subsidiary Cities Service Oil Company (Cities Service), plaintiffs-appellants, to obtain injunctive relief from all or part of their purchase obligations under the Old Oil Entitlements Program,[1] 10 CFR

[1] Cities Service sought to enjoin the imposition or enforcement of any entitlement purchase obligations based on its refining more old oil than the national average or, in the alternative, to enjoin the imposition or enforcement of any entitlement purchase obligations based on its refining its own old oil production.

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§ 211.67 (Entitlements Program), 39 FR 42,246 (Dec. 4, 1974), and a declaratory judgment that the actions of the Federal Energy Administration,[2] et al. (FEA), defendants-appellees, in promulgating the Entitlements Program were unlawful on the grounds that such actions were: in excess of the agency's statutory authority; arbitrary, capricious, and an abuse of discretion; not in accordance with the governing statute; and an unconstitutional burden on the plaintiffs.[3]

Cities Service based these contentions on its allegations that the program fails to physically allocate any crude oil or set the prices for such oil; that Cities Service is unable to pass through its increased costs under the program on a dollar-for-dollar basis as mandated by section 4(b)(2)(A) of the Emergency Petroleum Allocation Act

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[2] Congress established the Federal Energy Administration under the Federal Energy Administration Act of 1974, 88 Stat. 97, 15 U.S.C. § 761 (1975 Supp.), "to assure a coordinated and effective approach to overcoming energy shortages. . . ." 15 U.S.C. § 761(b).

[3] Pursuant to 10 CFR § 205 Subpart D, Cities Service filed an application with the Office of Exceptions and Appeals of the FEA for exception relief from the Entitlements program for purchase obligations arising out of the crude oil runs to stills made by Cities Service in November. *Cities Service Company*, Case No. FEE 1443 (filed 2-7-75, decided 2-20-75), 3 CCH Energy Management ¶ 83,043. Subsequently, Cities Service filed an application for complete exception relief from the Entitlements program for the duration of the regulations' existence. *Cities Service Company*, Case No. FEE 1459 (filed 2-13-75, decided 3-27-75), 3 CCH Energy Management ¶ 83,100. Both applications for relief were denied by the FEA. Under 10 CFR § 205.58 and § 205.100(b), a party aggrieved by an order issued by the FEA under, *inter alia*, 10 CFR § 205 subpart D, has not exhausted its administrative remedies until an appeal has been filed pursuant to 10 CFR § 205, subpart H, and an order granting or denying the appeal has been issued. Cities Service filed an appeal from the February 20, 1975 decision of the FEA, which was also denied. *Cities Service Company*, Case No. FEA 0385 (filed 3-24-75, decided 4-8-75), 3 CCH Energy Management ¶ 80,568.

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of 1973, 87 Stat. 628, as amended, 15 U.S.C. § 753(b)(2)(A) (1975 Supp.); that the classification of buyers and sellers under the program lacks a rational basis; the program causes further market distortions; that the small refiner bias is arbitrary and capricious; that under the program Cities Service is required to make cash payments to its refiner-competitors which is not mandated by the Allocation Act and constitutes an unconstitutional taking of property for private purposes without just compensation prohibited by the Fifth Amendment, and that the program is an unconstitutional tax prohibited by Article I, Sec. 8, cl. 1 of the Constitution.

On July 10, 1975, the district court consolidated the hearing on plaintiffs' motion for a preliminary injunction with a plenary hearing on the merits; denied the plaintiffs injunctive relief; refused to certify plaintiffs' constitutional claims, finding them insubstantial and without merit;[4] and entered judgment for the defendants. *Cities Service Company, et al.* v. *F.E.A., et al.* (D.D.C. CA No. 75-653, July 10, 1975), 3 CCH Energy Management ¶ 26,024. Most of plaintiffs' contentions were rejected by the district court for the reasons three district courts had held that FEA's Entitlements program was authorized by the governing statute and the constitutional questions presented were without merit. *Exxon Oil Company* v. *F.E.A.*

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[4] Under section 211(c) of the Economic Stabilization Act of 1970, 84 Stat. 799, as amended (Stabilization Act), 12 USC § 1904 note (1975 Supp.), as incorporated into the Allocation Act by section 5(a)(1) thereof, 15 USC § 754(a)(1) (1975 Supp.), in any action where the district court determines that a substantial constitutional issue exists, the court must certify such issue for resolution by the Temporary Emergency Court of Appeals. As the district court stated, citing *Delaware Valley Apartment House Owners' Ass'n* v. *U.S.*, 350 F.Supp. 1144 (E.D.Pa. 1972), *aff'd*, 482 F.2d 1400 (TECA 1973): "[s]uch [constitutional] questions are not substantial if they are plainly without merit or if previous Supreme Court decisions appear to foreclose the subject." 3 CCH Energy Management ¶ 26,024 at p. 26,224.

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(D.N.J. CA No. 75-150, Jan. 30, 1975), dismissed for lack of jurisdiction, 516 F.2d 1397 (TECA, 1975), 3 CCH Energy Management ¶ 26,019; *Marathon Oil Co.* v. *F.E.A.* (N.D. Ohio CA No. 75-36, Jan. 31, 1975), 3 CCH Energy Management ¶ 26,015, dismissed for lack of jurisdiction, 516 F.2d 1397 (TECA, 1975), 3 CCH Energy Management ¶ 26,019; *Gulf Oil Corporation* v. *F.E.A.*, 391 F.Supp. 856 (W.D.Pa. 1975), 3 CCH Energy Management ¶ 26,014, dismissed for lack of jurisdiction, —— F.2d —— (TECA Slip Opinion No. 3-6, June 20, 1975). Notice of appeal was filed in this court by Cities Service on July 18, 1975.

Exxon, Marathon, and Gulf, respectively, have filed briefs in support of Cities Service's position.

Cities Service is an integrated petroleum company engaged in producing, transporting, refining, purchasing, and selling crude oil and petroleum products. A high proportion of the crude oil Cities Service refines is its own "old" oil production, i.e., crude oil the price of which is controlled by the FEA at approximately $5.25 under the two-tier price system, 10 CFR § 212.73.[5] The two-tier price system was upheld by this court in a comprehensive opinion discussing the validity and effects of the system in *Consumers Union* v. *Sawhill*, —— F.2d ——, rehearing *en banc* (Slip Opinion No. DC-26, July 7, 1975), 3 CCH Energy Management ¶ 26,011, vacating 512 F.2d 1112 (TECA, 1975).

The two-tier price system effectively minimized the inflationary impact of rising world-wide oil prices and provided necessary incentives for increased domestic produc-

[5] The Cost of Living Council originated the "two-tier" pricing system for crude oil as a part of Phase IV of the Stabilization Program. 6 C.F.R. § 150, Subpart L, 38 F.R. 22,536 (Aug. 22, 1973). These rules were subsequently adopted by the Federal Energy Office as 10 CFR § 212, Subpart D, 39 F.R. 1924 (Jan. 15, 1974). The Federal Energy Office became the Federal Energy Administration on June 27, 1974, pursuant to the Federal Energy Administration Act of 1974, Pub. L. 93-275, 88 Stat. 97, 15 U.S.C. § 761 (1975 Supp.).

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tion. However, with the end of the Arab oil embargo and emergence of adequate crude oil supplies, the in-put cost of crude oil to refiners assumed crucial significance. Consumers could buy gasoline from stations with the lowest prices, rather than from stations with the shortest waiting lines. Thus, the great disparity between the price of controlled and uncontrolled crude oil was having an unequal impact on all refiners[6] and, contrary to other objectives of the Allocation Act, contained in sections 4(b)(1)(A)-(I), economic distortions, interference with the competitive viability of the small and independent sectors of the petroleum industry, and inequitable prices to consumers developed in certain areas of the country under the two-tier system due to the varying reliance of the geographic region in which they made gasoline and petroleum product purchases on uncontrolled domestic and imported oil.

Seeking to remedy this situation without losing the beneficial aspects of the two-tier price system, the FEA promulgated the Entitlements Program.[7] The basic purpose

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[6] As this court stated in *Pasco, Inc.* v. *F.E.A.*, —— F.2d —— (TECA Slip Opinion No. 10-7, Oct. 14, 1975), 3 CCH Energy Management ¶ 26,031 at p. 26,252, "During the base period of May, 1973, composite crude oil costs of all refiners were approximately equal; however, with the pricing system in effect, the major integrated oil companies, who as a class had far greater access to old oil, had significantly lower composite crude oil costs in refining their products than did the small and independent refiners." Prior to the advent of the two-tier price system, Cities Service had higher weighted average crude oil costs than the weighted average cost for all major refiners; however, the circumstances necessitating implementation of the two-tier system and passage of the Allocation Act resulted in the composite crude oil costs of Cities Service falling below that of other majors and the small and independent refiners.

[7] The Entitlements Program originated in a notice of proposed rulemaking issued by the FEA on August 28, 1974, 39 F.R. 31,650 (Aug. 30, 1974), following which public hearings were held and over 600 comments were received by the FEA. A second notice of

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of the Entitlements Program was to spread the benefit of access to old price-controlled oil and the burden of dependence on uncontrolled oil among all sectors of the petroleum industry, all regions of the country, and among all consumers of petroleum products,[8] while retaining the incentives for increased production and anti-inflationary measures which the two-tier price system provided.

The Entitlements Program essentially requires petroleum refiners to shift their over-all reliance on controlled or uncontrolled oil to a more balanced position among all the refiners. A refiner must, under the Entitlements Program, have one entitlement for each barrel of old oil which it refines during any month. The FEA issues a certain number of entitlements to each refiner each month, based on that refiner's proportionate share of all old oil refined on a nation-wide basis, adjusted somewhat by the small refiner bias.[9] The program thus commenced on the premise that all refiners should be including an equal proportionate share of price-controlled oil in their refinery runs each month.

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proposed rulemaking was issued by the FEA on November 7, 1974, 39 F.R. 39,740 (Nov. 11, 1974), following which the FEA received over 175 comments on the proposed rule. On November 29, 1974, the FEA issued the Entitlements regulation in its final form. 39 F.R. 42,246 (Dec. 4, 1974).

[8] This court has previously stated with regard to a small refiner that: "Pasco, a profitable producer-refiner, operating in the petroleum industry, must accept its fair and equitable share of the burdens as well as the benefits of the programs implementing the Allocation Act which the national energy crisis necessitated." *Pasco, Inc.* v. *FEA*, —— F.2d —— (TECA Slip Opinion No. 10-7, Oct. 14, 1975), 3 CCH Energy Management ¶ 26,031 at p. 26,256.

[9] The small refiner bias provides additional entitlements to small refiners in an amount based on a designated percentage of each small refiner's average daily volume of crude oil runs to stills. 39 F.R. 42,246 (Dec. 4, 1974).

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Entitlement purchase obligations are imposed on a refinery when, on the basis of information supplied to the FEA, it has been determined that the refiner was running more old oil as a percentage of its total crude oil refinery runs than the national average and consequently does not have sufficient entitlements for all of the old oil it has refined during that month. Those refiners with less old oil in their refinery runs than the national average would receive more entitlements than necessary for compliance, which they may sell to those refiners which have purchase obligations under the regulations. Thus,

> [b]y requiring refiners and importers who sell entitlements to reduce their crude oil or product costs by the amount of the entitlement sales proceeds, and allowing a purchaser of entitlements to include the cost of entitlements in its crude oil costs, the FEA basically equalized the average weighted crude oil costs of all refiners, thereby eliminating the inequities caused by the 'two-tier' pricing system.

Pasco, Inc. v. FEA, —— F.2d —— (TECA Slip Opinion No. 10-7, Oct. 14, 1975), 3 CCH Energy Management ¶ 26,031, at p. 26,252, rev'g —— F.Supp. —— (D.Wy.Dkt. No. C75-91, Aug. 27, 1975), 3 CCH Energy Management ¶ 26,025.

Cities Service contends on this appeal that the Entitlements Program is not authorized by the Allocation Act and is not within the FEA's authority to allocate and specify prices for crude oil, residual fuel oil and refined petroleum products. This contention is based upon Cities Service's misinterpretation of Section 4(a) of the Allocation Act and a disregard of the objectives, set forth by Congress in Section 4(b), which the regulations promulgated under Section 4(a) are to achieve "to the maximum extent practicable." Cities Service contends that the objectives of Section 4(b) set forth goals to be accomplished by regulations promulgated under the Allocation Act, but

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that those goals do not delegate any power or authority to the FEA independent of that authority contained in Section 4(a). It asserts that statutory goals such as "protection of public health, safety and welfare . . . and the national defense" are too broad to constitute a grant of any authority independent of Section 4(a).

A proper interpretation of the Allocation Act and its provisions requires recognition of the fact that the authority under Section 4(a) must be read together with the objectives which the exercise of that authority is to obtain. As stated by the Supreme Court in *Richards* v. *United States*, 369 U.S. 1, 11, 82 S.Ct. 585, 591 (1962): "We believe it fundamental that a section of a statute should not be read in isolation from the Context of the whole Act. . . ." In *Mastro Plastics Corporation* v. *National Labor Relations Board*, 350 U.S. 270, 76 S.Ct. 349, 100 L.Ed. 309 (1956), the Supreme Court, in interpreting Section 8(d) of the National Labor Relations Act, as amended, rejected "a narrowly literal construction" of the statute and stated:

> If the above words are read in complete isolation from their context in the Act, such an interpretation is possible. However, "In expounding a statute we must not be guided by a single sentence or member of a sentence but look to the provisions of the whole law and to its object and policy." United States v. Boisdore's Heirs (U.S.), 8 How 113, 122, 12 L.Ed. 1009.

350 U.S. at 285, 76 S.Ct. at 359, 100 L.Ed. at 321. *N.L.R.B.* v. *Lion Oil Co.*, 352 U.S. 282, 288, 77 S.Ct. 330, 1 L.Ed.2d 331, 337 (1957); *Allied Chem. & Alkali Wkrs.* v. *Pittsburgh Plate Glass Co.*, 404 U.S. 157, 185, 92 S. Ct. 383, 400, 30 L.Ed2d 341 (1971); *Golden State Bottling Co., Inc.* v. *N.L.R.B.*, 414 U.S. 168, 177, 94 S.Ct. 414, 421, 38 L.Ed.2d 388 (1973).

In a recent decision of the Supreme Court, it has reaffirmed these principles of statutory construction in holding

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that the language and meaning of Section 7602 of the Internal Revenue Code of 1954 [which authorizes the Internal Revenue Service (IRS) to issue summons to further its tax investigations] had to be interpreted in a manner consistent with the authority to conduct broad investigatory inquiries conferred on the IRS under Section 7601, in order to avoid frustrating the purpose of those inquiries. *United States* v. *Bisceglia*, 420 U.S. 141, 150 (1975).

In the Joint Explanatory Statement of the Committee of Conference on the Allocation Act, Conference Report 93-628, 2 U.S. Code Cong. & Ad. News, 93 Cong., 1st Sess. 2688, 2689, the Committee stated: "The President is intended to have full flexibility in devising the most effective and efficient means of meeting the priority needs of the American people identified in Section 4(b)." Thus, the allocation and pricing authority of Section 4(a) are without vitality unless and until the FEA exercises such authority in a manner which, to the extent practicable, gives effect to the objectives of Section 4(b).

Neither was the allocation authority considered by Congress as being separate and apart from the pricing authority conferred on the FEA. The Conference Report states: "The conference committee has decided to couple price controls with the mandatory allocation authority so as to focus in a single act decision-making authority and responsibility for dealing with the fuels shortage situation . . . . Congress intends to force the Administration to rationalize and harmonize the objective of equitable allocation of fuels with the objective of the Economic Stabilization Act." Conference Report 93-628, *supra*, 2 U. S. Code Cong. & Ad. News, 93d Cong., 1st Sess. 2688, 2702. Therefore, plaintiff's insistence upon the bifurcation of the authority conferred on the FEA under Section 4(a) from the objectives of 4(b), in their endeavor to assert the lack of specific authority under the Allocation Act for the Entitlements Program, is unwarranted and unreasonable. The Entitlements Program

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is clearly within the authority conferred on the FEA under the Allocation Act.[10]

Cities Service further contends on this appeal that the Entitlements Program, 10 CFR § 211.67, as promulgated by the FEA, violates Section 4(b)(2)(A) of the Allocation Act by failing to provide Cities Service with an effective means of passing through its costs resulting from the Entitlements Program on a dollar-for-dollar basis. The Allocation Act, under Section 4(b)(2)(A) mandates that the FEA, in promulgating its regulations, provide a dollar-for-dollar pass-through of net increases in the cost of crude oil. The FEA has responded to this mandate through 10 CFR § 212.83(c)(2). Under this regulation the cost of entitle-

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[10] While it is not necessary to go further in finding authority for the Entitlements program, we note that in *Pasco, Inc.* v. *FEA*, *supra*, 3 CCH Energy Management at p. 26,258, n. 21, this court stated that: "[t]he Committee Reports of the Senate and House are quite enlightening on the FEA's authority to promulgate the Entitlements program." During its consideration of the first extension of the Allocation Act, a Senate Committee stated that the Allocation Act

> provides ample authority for the F.E.A. to institute a system of price equalization to provide that all segments of the industry benefit from lower-priced domestic oil. The Committee was urged to amend the Act to achieve this objective but has been assured that F.E.A. intends to institute a price equalization program under existing authority in the immediate future.

S. Rep. No. 93-1082, Comm. on Interior and Insular Affairs, 93d Cong., 2d Sess. at 2 (Aug. 9, 1974).

Further, a House Committee Report, issued two months later, clearly indicates the FEA's authority

> to institute a system of price equalization applicable to crude oil, residual fuel oil and refined products to eliminate the regional and competitive inequities which result from a dependence upon high-cost imported oils and petroleum products. The F.E.A.'s stated commitment to Subcommittee Chairman Macdonald during the hearings on this bill to move promptly on a price equalization program has convinced the Committee

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ment purchases and the revenues from entitlement sales must be added to or deducted from the cost of crude oil purchased or landed in that month, for the purposes of calculating the increased cost to be applied to product prices for the following month under the "A+" factor of Section 212.83(c)(2), which is the general product pricing formula.

Cities Service argues that because it has certain banked costs which it was unable to pass through in earlier months prior to the promulgation of the Entitlements Program, it cannot now pass through its entitlements costs due to the current passing through by Cities Service of these former banked costs. The FEA pass-through regulation provides

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that specific amendments to the Act to compel such action may prove to be unnecessary.

H. Rep. No. 93-1443, 93d Cong., 2d Sess. at 3 (Oct. 8, 1974).

Cities Service contends that such legislative reports are "subsequent legislative history" such as are proscribed by the Supreme Court in Regional Rail Reorganization Act Cases, 419 U.S. 102, 132 (1974). The Court there stated, "post-passage remarks of legislators, however explicit, cannot serve to change the legislative intent of Congress expressed before the Act's passage." However, in this case the Allocation Act was directly before Congress by reason of the expiration of the Act and the necessity of extending its provisions as Congress saw fit. Therefore, the above reports are contemporaneous with the Act's extension and, further, the remarks are not being used to indicate any different legislative intent, but rather that intent expressly found by a contemporaneous construction of the Act by the agency charged with administering it.

Courts give great deference to the construction of an Act by the agency charged with administering it, and hence where Congressional intent congruous therewith is found to have been expressed not subsequent to the Act's passage but contemporaneously with the Act's renewal, its pertinence to the court's task in adjudging the agency's exercise of authority under the Act is clear. *See*, generally, *Udall* v. *Tallman*, 380 U.S. 1 (1965); *Pacific Coast Meat Job. Ass'n, Inc.* v. *Cost of Living Coun.*, 481 F.2d 1388 (T.E.C.A. 1973); *University of Southern California* v. *Cost of Living Coun.*, 472 F.2d 1065 (T.E.C.A. 1972).

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for the pass-through of costs other than those derived from the Entitlements Program.[11] However, Cities Service has, during the first four months of 1975, passed through under this regulation costs totaling more than their $23.9 million of entitlement purchases incurred over the same period of time.[12] Whether or not the increased costs which Cities Service passed through were banked costs or entitlement costs, the FEA pass-through regulation is clearly effective for the purpose for which it was promulgated.[13] Whether or not Cities Service passes through its entitlement costs in the month following their purchase, or in a much later month, depends on business judgments which Cities Service must make. The Allocation Act does not guarantee that all increased costs will be absorbed by the market place without any change in the market shares of the respective companies when they pass through such costs under section 4(b)(2)(A); rather, the Act merely mandates that an opportunity for the pass-through of such costs be provided. This the FEA has done, and this court holds that the Entitlements Program does not violate section 4(b)(2)(A) of the Allocation Act.

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[11] Under 10 CFR § 212.83, a refiner's increased product and nonproduct costs may be included to the extent provided in § 212.83, in the computation under § 212.82 of base prices and allowable prices in excess of the base prices for covered products.

[12] See Finding of Fact Number 25, *Cities Service* v. *F.E.A.*, —— F.Supp. —— (D.D.C. CA No. 75-653, July 10, 1975), 3 CCH Energy Management ¶ 26,024 at p. 26,221.

[13] The district court did not, as appellant erroneously contends, premise its finding that Cities Service had failed to show that it could not recover its entitlement purchase costs from the market place on the conclusion that every dollar Cities Service recovered during the first four months of 1975 constituted a recovery of entitlement purchase costs. The district court found that during the first four months of 1975 Cities Service was passing its increased costs through under 10 CFR § 212.83 and thus a mechanism was clearly available by which Cities Service could have passed through its entitlement purchase costs if it had chosen to do so.

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Cities Service further contends that the Entitlements Program is arbitrary and capricious and constitutes an abuse of administrative discretion on the part of the FEA, for the reasons that: the entitlements regulation fails to provide for a separation of those companies within the petroleum industry which are integrated companies from those which are not; the Entitlements Program impacted on the market in such a way as to require certain further market distortions by the FEA through its exception process; and the small refiner bias included within the Entitlements regulation, 10 CFR § 211.67(e), is arbitrary and capricious. As stated in *Pasco, Inc.* v. *F.E.A., supra,* 3 CCH Energy Management ¶ 26,031, at p. 26,256.

> [i]n reviewing the discharge of an agency's function in interpreting the Act, promulgating regulations thereunder and applying and enforcing such regulations, this court has recognized that where administrative control has been Congressionally authorized, the "judicial function is exhausted when there is found to be a rational basis for the conclusions approved by the administrative body." *Pacific Coast Meat Jobbers Association, Inc.* v. *Cost of Living Council,* 481 F.2d 1388, 1391 (TECA 1973), which was quoting from *Mississippi Valley Barge Co.* v. *United States,* 292, U.S. 282, 286-287, 54 S.Ct. 692, 694, 78 L.Ed. 1260 (1934).

This court, in *Pasco,* found that the plaintiffs in that case had failed to establish that the Entitlements Program was arbitrary, capricious, or beyond the agency's authority due to its failure to make a differentiation within the regulation between refiners producing their own crude oil and those refiners purchasing their refining needs. In so holding, we stated:

> The regulation, [10 C.F.R. 211.67] by granting entitlements to those refiners with old oil ratios below the national ratio due to their own high production of

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> new, released and stripper well oil, merely provides for the continuation of the monetary incentive which was a fundamental part of the "two-tier" pricing system. The correction of economic distortion and unfair competitive conditions occasioned by the "two-tier" system was considered essential by Congress and the FEA. . . . This court finds ample support for the entitlements regulation as promulgated by the FEA and, considering the urgent need for action, the implementing agency's program for achieving the varied objectives of the Allocation Act was certainly rational and neither arbitrary, capricious, nor beyond the authority of the agency.

Pasco, Inc. v. *F.E.A., supra,* 3 CCH Energy Management ¶ 26,031, at p. 26,258.

We therefore hold that the Entitlements regulation is a rational response to the changing conditions under which the objectives of section 4(b) must be read, and that the regulation is not arbitrary, capricious or an abuse of administrative discretion.

In accord with the decisions of three district courts which had previously faced the question of the constitutionality of the Entitlements Program, *Exxon Oil Company* v. *F.E.A., supra; Marathon Oil Co.* v. *F.E.A., supra;* and *Gulf Oil Corporation* v. *F.E.A., supra,* the district court in this case found that the contentions of Cities Service as to the unconstitutionality of the program did not present susbtantial constitutional questions requiring certification to this court. Cities Service contends on this appeal that the entitlement purchase obligations imposed on it under 10 CFR § 211.67 are "a *prima facie* case of taking private property and direct bestowal upon another"; that Cities Service is being deprived of its secure access to domestic oil; that the Entitlements regulation constitutes a taking without just compensation; and that it is an unconstitutional tax.

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Claims for compensation from the government based upon the Fifth Amendment to the Constitution require a direct appropriation by the government of the claimant's property and do not encompass "consequential injuries resulting from the exercise of lawful power." *Knox* v. *Lee*, 79 U.S. 457, 551 (1870). In reviewing an order of the War Production Board which required the shut-down of non-essential gold mines due to the short supply of equipment and resources, the Supreme Court, in *United States* v. *Central Eureka Mining Co.*, 357 U.S. 155, 168 (1958), recognized that action under a regulation may so diminish the value of property as to constitute a taking, but stated: "[T]he mere fact that the regulation deprives the property owner of the most profitable use of his property is not necessarily enough to establish the owner's right to compensation."[14]

Cities Service and the *amici curiae* ardently contended that *Thompson* v. *Consolidated Gas Utilities Corp.*, 300 U.S. 55 (1937), "closely parallels" or "controls" this appeal and mandates a finding that the Entitlements program is unconstitutional. For the reasons discussed below we reject this contention.

In *Thompson*, the Supreme Court held invalid a gas proration order issued by the Texas Railroad Commission which limited the production of sweet gas from the plaintiffs' wells to an amount below their production levels, transportation and marketing capacities, and contractual market requirements. This order was issued December 10, 1935, pursuant to House Bill No. 266 (Acts of Texas 1935, c. 120, Vernon's Ann. Civ Stats. Texas, art. 6008), which

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[14] This court had previously held, with regard to the Economic Stabilization Program, that the imposition of price ceilings on beef or the freezing of beef prices was not a "taking of their property without just compensation in violation of the due process clause of the fifth Amendment." *Western States Meat Packers Ass'n Inc.* v. *Dunlop*, 482 F.2d 1401, 1403 (TECA 1974).

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was enacted as "a comprehensive conservation statute."[15] *Consolidated Gas Utilities Corp.* v. *Thompson,* 14 F.Supp. 318, n. 3, 319-321 (W.D.Tex. 1936). The Supreme Court stated that the statute,

> construed as authorizing regulations to prevent waste, and to create and protect correlative rights of owners in a common reservoir of gas . . . , is a valid exercise of the State's undoubted power to legislate to those ends. . . . But, obviously, the proration orders would not be valid if shown to bear no reasonable relation either to the prevention of waste or the protection of correlative rights. . . .

300 U.S. 55, 69. Finding that plaintiffs had amply demonstrated that their operations were free of waste and that continued operations would not be prejudicial to any public

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[15] The Commission order in question indicated that because of the lack of any market demand for natural gas, "intolerable waste" was occurring and "by the fall of 1934, in excess of one billion cubic feet of gas was being blown into the air daily." *Consolidated Gas Utilities Corp.* v. *Thompson,* 14 F.Supp. 318, n. 3, p. 319-321 (W.D. Tex. 1936). The Supreme Court, quoting from special findings of the lower court, found adequate support for plaintiff's assertions that House Bill 266 was a conservation statute intended to prevent waste and that the plaintiffs were not committing any wasteful acts. The Court stated:

> "Before House Bill 266 went into effect, grossly wasteful practices in the production of natural gas in the Panhandle field were occurring," but "most of this waste was due to the extravagant production of natural gas from oil wells and to the production of gas from gas wells and processing such gas for the extraction of a very small quantity of natural gasoline therefrom and popping or wasting to the air the residue gas, which constituted 97% of the fuel value of the gas in its original state. . . . No evidence was offered—indeed, it was not even seriously claimed—that anything complainant had done or contemplated doing has, in the slightest degree, contributed or will contribute to that waste."

Thompson v. *Consolidated Gas Utilities Corp.,* 300 U.S. 55, 70 (1937).

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interest or private property rights, the Court concluded that the "sole purpose" of the orders limiting the plaintiff's production was "to compel complainants to afford markets to those having none," 300 U.S. 55, 77-8, and as such, the orders were invalid.

However, in *Railroad Com.* v. *Rowan & Nichols Oil Co.*, 310 U.S. 573 (1940), the Supreme Court upheld an oil proration order of the Texas Railroad Commission for the East Texas oil field against a Fourteenth Amendment attack that by virtue of allowances made to "marginal wells" (which would have had to be prematurely abandoned had the proration formula restricted their low productive capacity), "[t]he Commission's proration formula as applied permits other leaseholders, more leniently treated, to capture oil at a more rapid rate than is possible for the respondent, thereby draining away oil which underlies respondent's leased lands." 310 U.S. 577, 578. The individual interests of the small well operators and their effect on the state's economy, as well as the general problem of prorating the oil and gas production in the state, were considered by the Court to be within the province of the Commission.[16] The Court particularly noted, at 310 U.S. 577, 583 n. 1, that:

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[16] Referring to the complex "brood of litigation" challenging the administrative determinations which developed out of the states' attempts to adjust leasehold owners' interests with the "rule of capture," the Court, in *Railroad Com.* v. *Rowan & Nichols Oil Co.*, 310 U.S. 573, 580-584 (1940), stated:

> [S]uch cases are only episodes in the evolution of adjustment among private interests and in the reconciliation of all these private interests with the underlying public interest in such a vital source of energy for our day as oil. Certainly so far as the federal courts are concerned the evolution of these formulas belongs to the Commission and not to the judiciary. A controversy like this always calls for fresh reminder that courts must not substitute their notions of expediency and fairness for those which have guided the agencies to whom the

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> *We are here not concerned with a statute, or orders under it, not thought to enforce state policy* "for the prevention of waste, and the protection of correlative rights of owners in the common pool," *but directed solely* "to compel those who may legally produce, because they have market outlets for permitted uses, to purchase gas from potential producers whom the statute prohibits from producing because they lack such a market for their possible product." *Thompson* v. *Consolidated Gas Utilities Corp.*, 300 U.S. 55, 69, 77, 81 L ed 510, 517, 522, 57 S Ct 364. [Emphasis added]

The differences between the circumstances and principles considered and discussed in *Thompson* and the relevant considerations before us now are abundantly clear. Grossly excessive production in the East Texas oil fields twice drove the price of East Texas oil down to ten cents or less per barrel during the early 1930's.[17] In *Cities Service Gas Co.* v. *Peerless Oil & Gas Co.*, 340 U.S. 179 (1950),

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formulation and execution of policy have been entrusted. . . . It is not for the Federal courts to supplant the Commission's judgment even in the face of convincing proof that a different result would have been better.

[17] Hardwicke, *Legal History of Proration of Oil Production in Texas*, 56 Tex. Bar Ass'n Proceedings 99, 111, 120 (Tex. L.R. 1937). By 1932, oil and gas were "universally recognized by courts and Legislatures as natural resources; and legislation looking to their conservation and the prevention of . . . [their waste had] been enacted in practically every state where these resources . . . [were] discovered." *Danciger Oil & Refining Co.* v. *Railroad Commission*, 49 S.W.2d 837, 840 (Tex. C.A.—Austin 1932). It was legislation dealing with these interests of conservation which spawned contumacious production and voluminous litigation for many years. For a background of the Texas experience and the litigation of the oil and gas legislation enacted there, referred to by the Supreme Court in *Railroad Com.* v. *Rowan & Nichols Oil Co.*, 310 U.S. 573, 580 (1939), as an example of the litigation following administrative efforts to solve the adjustment of state and private interests in natural resources, see the Special Order in question and quoted in *Consolidated Gas Utilities Corp.* v. *Thompson*, 14 F.Supp. 318, n. 3, 319-321 (W.D. Tex. 1936).

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the Supreme Court upheld orders of the Oklahoma Corporation Commission which required Cities Service to make a connection with, and take natural gas ratably from, a Peerless Oil & Gas Company well at a price no less than seven cents per thousand cubic feet. Finding the *minimum* price-fixing order lawful as it was substantially related to the alleviation of "existing low field prices [which] were 'resulting in economic waste and conducive to physical waste,' " the Court rejected Cities Services' Due Process and Equal Protection attacks on the Commission orders as being "virtually without substance." 340 U.S. 179, 185-6.

The factual background which preceded enactment of the Allocation Act evidences the increasingly demanding and complex problems facing the country and its governing bodies. The United States unquestionably has become perilously dependent on foreign produced oil, the supply of which is very unstable. By 1973, before the Arab oil embargo, the percentage of crude oil imported for consumption in the United States had reached 35 per cent.[18] The Emergency Petroleum Allocation Act of 1973, as amended, was enacted to meet this and other related energy problems.

While the nation's supply of domestic and imported crude oil is presently adequate, there is a severe shortage of domestically produced crude oil. The availability of imported crude oil is uncertain, and it can be purchased only at drastically higher prices. Greater access to lower cost domestic crude oil by the larger refiners as a class, leaving the small and independent refiners as a class to fend for themselves in purchasing the higher priced imported or domestically produced "new" oil, brought about the necessity for the Entitlements program.

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[18] Project Independence, Executive Summary, 3 CCH Energy Management ¶ 25,005, at p. 25,012 (Fall 1974).

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We repeat that the Entitlements program, like others under the Allocation Act, is a temporary program. *Condor Operating Co.* v. *Sawhill*, 514 F.2d 351 (TECA 1975), cert. denied, 421 U.S. 976 (1975).[19] It composes one segment of an over-all emergency program designed to alleviate the inflationary-recessionary effects on the United States of the Arab oil embargo and the four-fold increase in world oil prices, while the nation prepares itself for energy self-sufficiency and recovery of its economic stability and freedom. The smaller refiners and independent marketers were hit much harder by these world events than were the larger and often integrated oil companies. The fact that Cities Service cannot now capitalize upon these events and refine its own much lower priced oil at will and thereby gain a larger market share or even higher profit margins does not render the program unconstitutional. As stated in *Condor Operating Co.* v. *Sawhill, supra*, at 361:

> The regulation of future action based on rights previously acquired by the person regulated is not per se prohibited by the constitution. *Fleming* v. *Rhodes*, 331 U.S. 100 (1947). Reasonable and practical regulations which are generally fair and equitable, although not necessarily so as applied to a particular person, are not unconstitutional when general regulations are necessary to accomplish an appropriate congressional purpose. *Bowles* v. *Willingham*, 321 U.S. 503 (1944), *Wilson* v. *Brown*, 137 F.2d 348 (Em.Ct. App. 1943).

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[19] The Allocation Act was originally scheduled to expire on February 28, 1975, but on December 5, 1974 it was extended to August 31, 1975. Pub.L. 93-511, 88 Stat. 1608, 1 U.S. Code Cong. & Adm. News, 93rd Cong., 2nd Sess. 1852 (1974). The Allocation Act was extended by Congress again on September 29, 1975 until the 15th of November, Pub. L. 94-99, 89 Stat. 481, 94th Cong., 1st Sess., 121 Cong. Rec. H 9193 (Sept. 26, 1975). On November 14, 1975, President Ford signed Public Law 94-133, which extends the Allocation Act until December 15, 1975. 94th Cong., 1st Sess., 121 Cong. Rec. S. 20046 (Nov. 14, 1975).

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In determining the validity of the stabilization authority granted the President under the Economic Stabilization Act, the three-judge court in *Amalgamated Meat Cutters & Butcher Work.* v. *Connally*, 337 F. Supp. 737, 754 (D.D.C. 1971), noted the relevance of the time frame imposed upon that Act. See *Fry* v. *United States*, —— U.S. ——, 95 S.Ct. 1792, 1796 (1975). This court has recognized time restraints on the Allocation Act. In *Condor Operating Co.* v. *Sawhill, supra*, at p. 362, this court said:

> Essential powers of government to meet this or other crises in perilous times would be frustrated by the adoption of an excessively rigid and unprecedented construction inhospitable to broad realities. "A limit in time, to tide over a passing trouble, well may justify a law that could not be upheld as a permanent change." *Block* v. *Hirsch*, 256 U.S. 135, 157 (1921). . . . Whether the challenged regulation and enforcement order would pass muster as a long continuing response to chronic energy problems need not be decided.[20]

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[20] A comparable price equalization pooling program, instituted by the Secretary of Agriculture under the Agricultural Marketing Agreement Act of 1937, was upheld by the Supreme Court against contentions that it was contrary to the Fifth and Fourteenth Amendments to the Constitution and an improper delegation of legislative power, in *United States* v. *Rock Royal Co-Operative*, 307 U.S. 533 (1939). The program was implemented to insure an adequate supply of milk while providing a fair division of this most profitable market among producers. All milk producers received a uniform price under the regulation for milk sold to milk handlers even though the value of the milk to the milk handler varied considerably, depending on the particular use made of the milk. However, those handlers putting their milk to a more profitable use were required, under a formula described by appellants herein as being "nearly as complex as the CEP [Entitlements Program]," to pay money through a pooling arrangement to those handlers using their milk in a less profitable fashion. While the regulation as originally applied and upheld by the Supreme Court did not regulate producer-handlers in their capacities as handlers,

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Further, it is well established that a regulatory scheme will not constitute a tax within the meaning of Article I, Section 8, Clause 1 of the Constitution, unless the real purpose and effect of the statute and regulations promulgated thereunder is to raise revenues for the general support of the government. *Head Money Cases (Edye* v. *Robertson),* 112 U.S. 580, 595, 5 S.Ct. 247, 28 L.Ed, 798, 803 (1884); *Moon* v. *Freeman,* 379 F.2d 382, 391 (9th Cir. 1967); *United States* v. *Strangland,* 242 F.2d 843, 848 (7th Cir. 1957); *Rodgers* v. *United States,* 138 F.2d 992, 995 (6th Cir. 1943). As the court stated in *Rodgers* v. *United States, supra,* at p. 994:

> The test to be applied is to view the objects and purposes of the statute as a whole and if from such examination it is concluded that revenue is the primary purpose and regulation merely incidental, the imposition is a tax and is controlled by the taxing provisions of the Constitution. Conversely, if regulation is the primary purpose of the statute, the mere fact that incidentally revenue is also obtained does not make the imposition a tax, but a sanction imposed for the purpose of making effective the congressional enactment.

Clearly, the Entitlements program does not, even incidentally, raise any revenue for the government or for its support. The entitlements regulation furthers the objectives and purposes of the Allocation Act by regulating refiners' access to crude oil, the price of which has been set below its market value in furtherance of other objectives of the Allocation Act. In addition, the Allocation Act and FEA regulations permit Cities Service to pass through its increased costs under the program and provide measures for the alle-

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i.e., it did not impose any payment obligation on a handler which was handling or processing its "own-produced" milk, such was subsequently required under an amendment to the regulation issued in 1957. The regulation as amended was upheld in *Ideal Farms, Inc.* v. *Benson,* 288 F.2d 608 (3 Cir. 1961), *cert.* denied, 372 U.S. 965 (1963); *Freeman* v. *Vance,* 319 F.2d 841 (5th Cir. 1963).

viation of extreme hardship through the exemption process, and the regulatory exceptions from its operations.

We hold that the Entitlements Program, promulgated under the authority of the Allocation Act, is valid and constitutional; that the contentions of Cities Service are rejected; that the judgment of the District Court was correct; and it is affirmed. SO ORDERED.

(Caption Omitted in Printing)

Upon consideration of Appellants' Petition for Rehearing, It Is Ordered that said Petition is denied.

For the Court

/s/ Ruth H. Jacobson
Ruth H. Jacobson
Clerk

January 28, 1976

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 75-653

CITIES SERVICE COMPANY, et al., *Plaintiffs*,

v.

FEDERAL ENERGY ADMINISTRATION, et al., *Defendants*.

(FILED JULY 10, 1975)

Findings of Fact and Conclusions of Law

This matter came before the court on plaintiffs' motion for a preliminary injunction and defendants' opposition thereto. Plaintiffs interposed no objection to this court consolidating this hearing with a plenary hearing on the merits. (Tr. 12). Defendants objected only in the event that the effectiveness of the passthrough provision was important to plaintiffs' constitutional argument. (Tr. 53). Under the circumstances the court has concluded that this is a proper case for consolidation of the motions hearing with the hearing on the merits. *See* Fed. R. Civ. P. 65(a)(2). In particular, this will allow expeditious appellate review of the important entitlements program. Accordingly, the following findings of fact and conclusions of law pertain both to plaintiffs' motion for preliminary injunction and also to a ruling on the merits. For the reasons which follow plaintiffs' motion will be denied and judgment shall be entered for defendants.

FINDINGS OF FACT

1. Plaintiff Cities Service Company is a corporation organized and existing under the laws of the state of Delaware with its principal office and principal place of business at the Cities Service Building in Tulsa, Oklahoma. Plaintiff Cities Service Oil Company is also a corporation organized and existing under the laws of the state

of Delaware with its principal office and principal place of business at the Cities Service Building in Tulsa, Oklahoma. Plaintiff Cities Service Oil Company is a wholly-owned subsidiary of Ciites Service Company. (The plaintiffs hereinafter will be referred to as "Cities Service").

2. Cities Service is engaged in the business of producing, transporting, refining and selling crude oil and refined petroleum products in the United States. Cities Service has a total refinery capacity of 268,000 barrels of crude oil per day.

3. Defendant Federal Energy Administration (FEA) is an agency and instrumentality of the United States under the Federal Energy Administration Act of 1974, 15 U.S.C. § 761 *et seq;* and was established by Executive Order No. 11,790 (June 27, 1974). The FEA is charged with administering the Emergency Petroleum Allocation Act of 1973, ("Allocation Act") (Pub. L. No. 93-159, November 27, 1973; as amended, Pub. L. No. 93-511, December 5, 1974).

4. Defendant Frank G. Zarb is the Administrator of FEA.

5. The Allocation Act requires FEA, as the delegate of the President, to promulgate a regulation for the mandatory allocation and pricing of crude oil, residual fuel oil and refined petroleum products produced in or imported into the United States (§ 4(a)). Those regulations are to implement "to the maximum extent practicable", the objectives set forth in Section 4(b)(1) of the Allocation Act.

6. The Section 4(b)(1) objectives are: the protection of public health, safety and welfare; maintenance of all public services and agricultural operations; preservation of an economically sound and competitive petroleum industry, including the priority need to preserve the competitive viability of independent refiners, small refiners, nonbranded independent marketers, and branded independent

marketers; the allocation of crude oil for refiners in the United States to enable such refiners to operate at full capacity; equitable distribution of crude oil, residual fuel oil, and refined petroleum products at equitable prices among all regions and areas of the United States, sectors of the petroleum industry and among all users; economic efficiency; and minimization of economic distortion, inflexibility, and unnecessary interference with market mechanisms.

7. To fulfill those objectives, the President first established the Federal Energy Office ("FEO") which adopted fuel allocation rules in December, 1973 and revised Petroleum Allocation and Price Regulations on January 14, 1974. (39 F.R. § 1924 *et seq.*)

8. The regulations adopted by FEO, the predecessor of FEA, incorporate a two-tier pricing system for crude oil, which was established by the Cost of Living Council ("CLC") in August, 1973, during Phase IV of the Economic Stabilization Program (6 C.F.R. § 150, Subpart L).

9. The two-tier pricing system on crude oil is designed to effectuate two purposes: (1) to curb the inflationary impact on the United States economy of rising crude oil prices caused by the concerted action of certain Arab oil producing nations; and (2) to encourage the development of new sources of domestic oil in order to reduce dependence on foreign supplies. The two-tier pricing system seeks to effectuate those dual purposes, basically, by placing a ceiling price on what is termed "old" domestic oil, thereby combating inflationary prices, while permitting newly discovered domestic oil to sell at the market price, thereby encouraging the development of domestic supplies.

10. More specifically, the two-tier pricing system imposes a ceiling price of approximately $5.25 per barrel on all "old" domestic crude oil, which is that amount of oil produced from a given property at or below the level of production from the same property in 1972. Crude oil pro-

duced in excess of 1972 production levels from the same property ("new" oil) is sold at market prices, and each barrel of "new" oil produced releases from the ceiling price a barrel of old oil ("released" oil). The first sale of imported crude oil into the United States remains free from price controls under FEA regulations, and the first sale of crude oil produced from "stripper" wells (wells producing less than 10 barrels per day) also is exempted from price controls under Section 4(e)(2)(A) of the Allocation Act.

11. Domestic crude oil which is not subject to a ceiling price, i.e., new, released and stripper well oil, presently sells at approximately $11.28 per barrel, while foreign crude oil now sells at approximately $12.63 per barrel. Approximately 60 percent of all crude oil runs to stills in the United States consists of oil not subject to an FEA ceiling price, while the balance, FEA price-controlled old oil, represents approximately 40 percent of all crude oil runs to stills.

12. The great disparity between the price of "old" oil and all other forms of oil in the United States, which is a direct result of FEA's two-tier pricing system was not, however, having an equal impact on all refiners, marketers and consumers. Instead, there existed uneven access to price controlled "old" oil, with most major integrated oil companies having far greater access to old oil than did the small and independent refiners, as a class. Thus, those refiners, including some majors, which were forced to rely more heavily on uncontrolled domestic or foreign crude oil incurred higher composite crude costs in the refining of products than those which had greater access to price-controlled old oil. The uneven distribution of old oil among refiners which created significant input crude cost differentials was translated into significant price differentials among refiners in their sales of refined petroleum products under applicable FEA price regulations. The end result

was that marketers and consumers were paying significantly different prices for the same refined product.

13. With the termination of the Arab oil embargo and a reemergence of adequate supplies, many of those refiners with higher input costs due to their low proportion of old oil, and those marketers to whom they sell, have had to endure a severe cost-price squeeze in order to remain competitive. A significant number of small and independent refiners and independent marketers—unable to absorb the full amount of such costs—were forced to charge higher prices for their products than their competitors.

14. Since the two-tier pricing system made price-controlled old oil more valuable to refiners than other types of uncontrolled domestic and foreign crude oil, FEA concluded that it was necessary to allocate the benefits of low priced old oil equitably throughout all segments of the petroleum industry, all regions of the country, and all users of petroleum products. Accordingly, on August 30, 1974, FEA published a notice of proposed rulemaking which culminated in the Cost Equalization Program (also referred to as the "CEP", "Entitlements Program" or "Old Oil Allocation Program") at issue in this proceeding. 10 C.F.R. § 211.67.

15. Under the cost equalization program, FEA issues monthly to each domestic refiner that number of "entitlements" which is equal to the refiner's proportionate share of the monthly national old oil supply, with an upward adjustment in the number of entitlements issued to those refiners qualifying for a "small refiner bias". An "entitlement" is defined as the right of a refiner owning the entitlement to include one barrel of old oil in its adjusted crude oil receipts in a particular month.

16. Entitlements issued in January 1975, the first month of the program, apply to November 1974 crude oil runs to stills. Similarly, entitlements issued in February 1975 ap-

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ply to December 1974 data, and the same sequence continues for each subsequent month of the program.

17. Refiners with more than their proportionate share of the national old oil supply must purchase entitlements for their excess supply from refiners with less than their proportionate share. Since FEA establishes the price of an entitlement each month with reference to the difference between the controlled and uncontrolled price of crude oil ($5.00 per entitlement for January and February; $6.00 per entitlement for March; $6.75 for April; and $7.31 for May), the net effect of the program is to give all refiners an equitable share of the benefits of price-controlled old oil.

18. To determine the precise number of entitlements issuable to a refiner (a refiner's proportionate share of the total old oil supply in a given month), FEA computes an "adjusted national old oil supply ratio" for each month. This ratio is the volume of old oil included in the aggregate crude oil receipts for all domestic refiners, expressed as a percentage of the total volume of crude oil runs to stills for all domestic refiners for that month. For example, if the total number of barrels of old oil was 200 million and the total number of crude runs is 500 million barrels, the old oil supply ratio is 2/5 or 40 percent. Thus, if all old oil were equitably allocated among all domestic refiners, each refiner would have crude oil runs which consist of 40 percent old oil. Since, however, FEA also issues entitlements to small refiners in a number adjusted upward in accordance with a "small refiner bias", the total volume of old oil used to calculate the national old oil supply ratio must be reduced by the number of additional entitlements so issued. Having established an adjusted national old oil supply ratio in the above manner, FEA applies this ratio to each domestic refiner's volume of crude oil runs and then issues to each refiner a sufficient number of entitlements to cover that percentage of its crude runs to stills.

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19. In addition to the number of entitlements it would otherwise receive as a refiner, a small refiner receives a further number of entitlements under a small refiner bias. Small refiners with a daily average volume of crude oil runs to stills of less than 175,000 barrels for a particular month are issued additional entitlements for each day of that month in a number equal to a designated percentage of its average daily volume, with the percentage basis becoming greater as crude oil runs become smaller. 10 C.F.R. § 211.67(2).

20. All refiners that sell entitlements are required to count their proceeds on entitlements sales as a reduction in crude oil or product costs.

21. All refiners that buy entitlements are permitted to count the cost thereof as an addition to crude oil costs. FEA rules further permit these increased crude oil costs to be passed through to the ultimate consumer on a dollar for dollar basis (the decision on whether to pass the costs along is left to the individual refiner).

22. Each month FEA publishes a list setting forth the name of each refiner to which entitlements have been issued; the number of entitlements issued to each such refiner; the number of entitlements to be purchased or sold by each such refiner; and the number of barrels of old oil included in each refiner's crude oil receipts. Entitlement purchases must be concluded by the last day of the month in which the entitlement list is published. Plaintiffs have been listed as a purchaser in each entitlement notice published since the advent of the program and up to mid-June, 1975 have purchased entitlements at a total amount of $23,901,194. Pursuant to the Entitlements Notice published on June 23, 1975 (40 F.R. 26498), plaintiffs are required to have purchased an additional 1,116,232 entitlements at a cost of $7.29 per entitlement by June 30, 1975.

23. On February 7, 1975, Cities Service filed with the FEA Office of Exceptions and Appeals its application for

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exception to the provisions of 10 C.F.R. § 211.67, relating to allocation of old oil, on grounds that the program is unlawful. By decision and order dated February 20, 1975, the Office of Exceptions and Appeals denied Cities Service's application for exception. Cities Service Company, 2 FEA ¶ 83,043 (February 20, 1975).

24. On March 24, 1975, Cities Service filed with the FEA Office of Exceptions and Appeals its appeal of the decision and order denying Cities Service's application for exception. By decision and order dated April 8, 1975, the Office of Exceptions and Appeals denied Cities Service's appeal. Cities Service Company, 2 FEA ¶ 80,568 (April 8, 1975).

25. As of December 31, 1974, Cities Service had significant amounts of increased product costs which it had banked and which it hoped to recover during 1975. The precise figures are set forth in the Affidavit of Charles D. Head, Jr. Because that affidavit contains arguably confidential information, the court will not quote precise figures. During the first four months of 1975 Cities Service has incurred further increased costs; as of April 30, 1975, its increased costs due to entitlement purchases amounted to $23,901,194. In the first four months of 1975 Cities Service has been able to recover significant amounts in increased product costs. The precise amount is set forth in the Head Affidavit and is in excess of the amount paid for entitlements over the same period. From the foregoing the court finds that Cities Service has not shown that it cannot recoup its entitlement costs from the marketplace.

26. A refiner with more than its proportionate share of the national old oil supply may sell its old oil and thereby avoid the need to purchase entitlements.

Conclusions of Law

1. This court has jurisdiction of this action under Section 5(a)(1) of the Emergency Petroleum Allocation Act,

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which incorporates §§ 205-211 of the Economic Stabilization Act of 1970, ("Stabilization Act"), as amended, P.L. 92-210, 85 Stat. 743.

2. Under Section 211(d) of the Stabilization Act, District Courts of the United States may enjoin, temporarily or permanently, the application of a regulation only if the regulation was in excess of the agency's authority, was arbitrary or capricious, or was otherwise unlawful under 5 U.S.C. 706(a).

3. To qualify for the extraordinary relief of a preliminary injunction, plaintiffs must demonstrate: (1) a substantial likelihood of success on the merits; (2) that without immediate injunctive relief plaintiffs will suffer irreparable harm; and (3) that the public interest will not be impaired by the granting of injunctive relief. *Virginia Petroleum Jobbers Ass'n* v. *Federal Power Commission*, 259 F.2d 921, 925 (D.C. Cir. 1958); *McGuire Shaft & Tunnel Corp.* v. *Local Union Co. 1791, U.M.W.*, 475 F.2d 1209, 1216 (T.E.C.A.), *cert. denied*, 412 U.S. 958 (1973). Plaintiffs have failed to establish any of those elements.

4. The cost equalization program is a valid exercise of FEA's allocation authority under Section 4(a) of the Allocation Act. Through the issuance of entitlements, the program distributes old oil and uncontrolled oil among domestic refiners and, therefore, constitutes an "allocation" regulation within the plain meaning of Section 4(a) of the Act. As three District Courts already have held, the fact that the program does not require a physical transfer of oil is irrelevant since the program achieves the same result as a physical allotment of oil without the disruptive physical element. *Marathon Oil Co.* v. *FEA*, Civil Action No. 73-36, N.D. Ohio, Western Division, January 31, 1975, dismissed for lack of jurisdiction, —— F.2d ——, T.E.C.A. No. 6-8, April 21, 1975; *Exxon Oil Company* v. *FEA*, Civil Action No. 75-150, D.N.J., January 30, 1975, dismissed for lack of jurisdiction, —— F.2d ——, T.E.C.A. No. 3-5, April

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21, 1975; *Gulf Oil Corporation* v. *FEA*, Civil Action No. 75-157, W.D. Pa., February 4, 1975, dismissed for lack of jurisdiction, —— F.2d ——, T.E.C.A. No. 3-6, June 20, 1975.

5. The principle of a cost equalization program was approved by both Houses of Congress at the time they extended the Allocation Act S. Rep. 93-1082, Comm. on Interior and Insular Affairs, 93d Cong., 2d Sess. at 2, August 9, 1975; and H. Rep. No. 93-1443, 93d Cong., 2d Sess. at 3, October 8, 1974.

6. The scope of judicial review of FEA's regulations is a narrow one under Section 706 of the Administrative Procedure Act, 5 U.S.C. § 706. The issue before the reviewing court is not whether the agency's decision was the best one possible or whether the reviewing court agrees with the decision. Instead, the agency's decision must be sustained if on all the facts it had a rational basis. *E.g.*, *Pacific Coast Meat Jobbers Ass'n* v. *Cost of Living Council*, 481 F.2d 1239 (T.E.C.A. 1974); *Condor Operating Co.* v. *Sawhill*, —— F.2d —— (T.E.C.A. February 5, 1975), *cert. denied*, —— U.S. —— (1975); *Exxon Corp., et al* v. *FEA, et al.*, Civil Action Numbers 74-1617; 74-1658; 74-1705 (D.D.C. June 17, 1975) (Slip op. at 13-14). The *Condor* court stated:

> Where the obvious intent of Congress is to give the President and his delegates broad power to do what reasonably is necessary to accomplish legitimate purposes rendered necessary by a recognized emergency, and regulations are fashioned to implement the Congressional mandate, the court should not interfere with the prerogative of the agency to select the remedy which for rational reasons is deemed most appropriate. . . .
>
> Exercising of the administrative authority and the accomplishment of purposes enumerated by Congress under the recognized emergency conditions are exceed-

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> ingly complicated undertakings. The petroleum industry itself is a complicated one. By reason of its intimate and convoluted relationship with the whole economy of the country it also tends to take upon itself the myriad problems besetting marketing and business activities generally It would be the height of folly and grievously incompatible with the rule of deference . . . myopically to 'solve' these problems solely on the basis of [plaintiff's] situation or by the court's off-hand ideas of regulatory alternatives differing from the rational approach set by the agency.
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> . . .
>
> [Plaintiff] considers only its own situation. But agency orders are not to be read in a vacuum but rather must be interpreted in the entire context in which they arise.

7. FEA's responsibility to effectuate "to the maximum extent practicable" the goals set forth in Section 4(b)(1) of the Allocation Act is a difficult one, and appropriate deference must be accorded agency expertise in light of the often-conflicting objectives of Section 4 (b)(1). *Union Oil Company of California* v. *FEA,* Civil Action No. CV-74-1943-MML (C.D. Calif., July 25, 1974); *Reeves* v. *Simon,* —— F.2d ——, (T.E.C.A. November 27, 1974); *Condor Operating Co., supra.*

8. The cost equalization program's allocation of old oil, working in conjunction with FEA's regulations on the pass-through of increased costs, is a rational attempt by FEEA to remove the inequities which have occurred under the two-tier pricing system. In so doing, the program effectuates the Congressional objectives of minimizing interferences with market mechanisms and of fostering competition, including the priority need to preserve the competitive viability of the small and independent sector.

9. The fact that some major integrated oil companies, and a few large independents, are entitlement sellers does

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not affect the rationality of the program. Rather the inclusion of large refiners as entitlement sellers properly effectuates the Section 4(b)(1)(E) Congressional objective of equitable product prices among all sectors of the industry and among all users of product, while preserving the competitive viability of the independent sector of the petroleum industry (Section 4(b)(1)(D)). *Marathon, supra; Exxon, supra; Gulf, supra.*

10. The small refiner bias in the issuance of entitlements is a rational attempt to effectuate the Allocation Act's goal of preserving the competitive viability of the small and independent sector of the petroleum industry.

11. The cost equalization program does not violate the "dollar-for-dollar passthrough" provision of Section 4(b)(2)(A) of the Allocation Act. The Act mandates only that FEA provide refiners with the opportunity to passthrough increased costs. The cost equalization program (10 C.F.R. § 211.67(e)(2) and FEA refiner price regulations (10 C.F.R. § 212.83), which provide for the passthrough of increased costs, meet that requirement. *Gulf, supra; Exxon, et al.* v. *FEA, et al., supra,* Slip op. at 15-17.

12. The FEA's method of determining the price of entitlements is not unlawful. *Consumers Union* v. *Sawhill,* No. DC-26 (T.E.C.A. July 7, 1975) (*en banc*).

13. Insofar as plaintiffs' constitutional challenges are concerned, this court is without power to decide those issues. *See* § 211(e)(2) of the Stabilization Act. This court, however, must certify constitutional questions to the Temporary Emergency Court of Appeals if it finds the issues to be substantial. Such questions are not substantial if they are plainly without merit or if previous Supreme Court decisions appear to foreclose the subject. *See Delaware Valley Apartment House Owner's Ass'n* v. *United States,* 350 F. Supp. 1144 (E.D. Pa. 1972), *aff'd,* 482 F.2d 1400 (T.E.C.A. 1973) and *California Water Service* v. *City of*

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Redding, 304 U.S. 252 (1938); *see also, Local Union No. 300, Amalgamated Meat Cutters and Butcher Workmen of North America, AFL-CIO* v. *McCulloch*, 428 F.2d 396 (5th Cir. 1970).

14. As three district courts already have held, plaintiffs' claim that the cost equalization program violates the Fifth Amendment does not raise a substantial constitutional question. *Marathon, supra; Exxon, supra; Gulf, supra.* The program effectuates the important public purposes set forth in Section 4(b)(1) of the Allocation Act through a fair and equitable regulatory scheme *(Condor Operating Co., supra);* does not result in a direct appropriation of property by the Government ("Legal Tender Cases"; *Knox v. Lee*, 12 Wall. (79 U.S.)) 457 (1870)); and at its worst, causes a restriction on profits which is not unlawful since such a restriction results from a valid regulatory scheme. (*Western States Meat Packers Ass'n* v. *Dunlop*, 482 F.2d 1401 (T.E.C.A. 1973) and *Local Union No. 11* v. *Boldt*, 481 F.2d 1392 (T.E.C.A.), *cert. denied*, 414 U.S. 1092 (1973). Moreover, as a valid regulatory scheme, the cost equalization program does not violate the Fifth Amendment even though it may deny the owner of the most profitable use of its property. *United States* v. *Central Eureka Mining Co.*, 357 U.S. 155 at 168 (1958); *United States* v. *Rock Royal Cooperative, Inc.*, 307 U.S. 533, 571-73 (1939); and *Thompson* v. *Consolidated Gas Utilities Corp.*, 300 U.S. 55 (1937). Finally, the cost equalization program does not lose its public character merely because it is implemented through the use of private parties. *Berman* v. *Parker*, 348 U.S. 26 (1954).

15. The cost equalization program is not a tax in violation of Article I, § 8, Cl. 1 of the Constitution primarily because the program does not raise revenues for the government, *Rodgers* v. *United States*, 138 F.2d 992, 994-995 (6th Cir. 1943); *United States* v. *Stangland*, 242 F.2d 843, 848

(7th Cir. 1957); *Moon* v. *Freeman*, 379 F.2d 382, 390-391 (9th Cir. 1967) but is, instead, a regulatory scheme.

16. Cities Service has failed to establish that it is likely to suffer irreparable harm.

17. Plaintiffs have not established that they have not been or will not be able to recover their entitlement costs through increased prices in the marketplace. Such speculative injury is not the basis of finding irreparable harm. *Union Oil, supra.*

18. Finally, the court concludes that the grant of a preliminary or permanent injunction would be contrary to the public interest by exacerbating existing disparities caused by the two-tier pricing system; by creating new inequities in the industry and the marketplace; by seriously imposing unnecessary and unfair burdens on entitlement sellers; and by generally impeding the public interest in securing the goals of the Allocation Act.

/s/ THOMAS A. FLANNERY
Thomas A. Flannery
United States District Judge

July 10, 1975
Date

(CAPTION OMITTED IN PRINTING)
(FILED JULY 10, 1975)

Order

Pursuant to Rule 65(a)(2) of the Federal Rules of Civil Procedure it is by the court this 9th day of July, 1975,

ORDERED that the court's consideration of plaintiff's motion for a preliminary injunction be, and the same hereby is, consolidated with the court's consideration of the merits of this case.

/s/ THOMAS A. FLANNERY
Thomas A. Flannery
United States District Judge

(Caption Omitted in Printing)

(Filed July 10, 1975)

Judgment

For the reasons stated in the Findings of Fact and Conclusions of Law filed with this Judgment, it is by the court this 10th day of July, 1975,

Ordered, Adjudged and Decreed that plaintiffs' motion for a preliminary injunction be, and the same hereby is, denied; and it is further

Ordered, Adjudged and Decreed that judgment be entered for defendants.

/s/ Thomas A. Flannery
Thomas A. Flannery
United States District Judge

Constitutional Provisions Involved

Article 1, Section 8, Clause 1 of the Constitution of the United States provides:

> The Congress shall have Power To lay and collect Taxes, Duties, Imposts and Excises, to pay the Debts and provide for the common Defence and general Welfare of the United States; but all Duties Imposts and Excises shall be uniform throughout the United States
> . . . .

The Fifth Amendment to the Constitution of The United States provides:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be com-

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pelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Statutory Provisions Involved

Section 4(a) of the Emergency Petroleum Allocation Act, 87 Stat. 627, 15 U.S.C. § 753(a), provides:

> Not later than fifteen days after the date of enactment of this Act, the President shall promulgate a regulation providing for the mandatory allocation of crude oil, residual fuel oil, and each refined petroleum product, in amounts specified in (or determined in a manner prescribed by) and at prices specified in (or determined in a manner prescribed by) such regulation. Subject to subsection (f), such regulation shall take effect not later than fifteen days after its promulgation. Except as provided in subsection (e) such regulation shall apply to all crude oil, residual fuel oil, and refined petroleum products produced in or imported into the United States.

Section 4(b)(1) of the Emergency Petroleum Allocation Act, *supra*, provides:

The regulation under subsection (a), to the maximum extent practicable, shall provide for—

> (A) protection of public health, safety, and welfare (including maintenance of residential heating, such as individual homes, apartments, and similar occupied dwelling units), and the national defense;
>
> (B) maintenance of all public services (including facilities and services provided by municipally, cooperatively, or investor owned utilities or by any State or local government or authority, and including trans-

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portation facilities and services which serve the public at large);

(C) maintenance of agricultural operations, including farming, ranching, dairy, and fishing activities, and services directly related thereto;

(D) preservation of an economically sound and competitive petroleum industry; including the priority needs to restore and foster competition in the producing, refining, distribution, marketing, and petrochemical sectors of such industry, and to preserve the competitive viability of independent refiners, small refiners, nonbranded independent marketers, and branded independent marketers;

(E) the allocation of suitable types, grades, and quality of crude oil to refineries in the United States to permit such refineries to operate at full capacity;

(F) equitable distribution of crude oil, residual fuel oil, and refined petroleum products at equitable prices among all regions and areas of the United States and sectors of the petroleum industry, including independent refiners, small refiners, nonbranded independent marketers, branded independent marketers, and among all users;

(G) allocation of residual fuel oil and refined petroleum products in such amounts and in such manner as may be necessary for the maintenance of exploration for, and production or extraction of, fuels, and for required transportation related thereto;

(H) economic efficiency; and

(I) minimization of economic distortion, inflexibility, and unnecessary interference with market mechanisms.

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Regulations Involved

10 C.F.R. § 211.62 contains the following definitions:

"Adjusted crude oil receipts" means the crude oil receipts of a refiner in a particular month the composition of which has been adjusted to reflect any invoice which is received in that month for crude oil (including crude oil sold under § 211.65) delivered to that refiner in any previous month (excluding, however, months prior to November 1974), and which has the effect of increasing or decreasing the volume of old oil received by that refiner in such previous month.

"Crude oil receipts" means, as to a particular refiner, the volume of crude oil (i) booked into its refineries in accordance with accounting procedures generally accepted and consistently and historically applied by the refiner concerned, for its own account or for the account of a firm other than a refiner or (ii) if not previously so booked into its refineries, delivered by that refiner for its account to another refiner pursuant to a processing agreement with that other refiner. Crude oil receipts shall not include crude oil received by a refiner for the purpose of processing at its refineries for the account of another refiner. A particular crude oil receipt shall be deemed to have occurred when the related cost is booked into refinery inventory in accordance with accounting procedures generally accepted and consistently and historically applied by the refiner concerned, whether or not such crude oil has been actually received by that refiner, except that crude oil delivered by one refiner to another refiner pursuant to a processing agrement will be deemed to have been delivered by the delivering refiner to the other refiner when the risk of loss passes to the other refiner under the particular processing agreement or when the crude oil is received at the refinery of the other refiner, whichever occurs first. Crude oil which has been added

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by a refiner to its inventory and which is thereafter sold or otherwise disposed of without processing for the account of that refiner shall be deducted from its crude oil receipts at the time when the related cost is deducted from refinery inventory in accordance with accounting procedures generally accepted and consistently and historically applied by the refiner concerned. The volume of old oil included in a refiner's crude oil receipts shall be evidenced by and consistent with invoices received with respect to such crude oil receipts.

"Entitlement" means, for a particular month, the right of a refiner owning the entitlement to include one barrel of old oil in its adjusted crude oil receipts in such month. The issuance and transfer of entitlements shall be evidenced on records maintained by the FEA.

10 C.F.R. § 211.67, Allocation of Old Oil, provides as follows:

(a) *Issuance of entitlements.*

(1) For each month, commencing with the month of November 1974, each refiner shall be issued entitlements by the FEA to include in its adjusted crude oil receipts for that month a specific number of barrels of old oil which will result in an old oil supply ratio for that refiner equal to the adjusted national old oil supply ratio for that month, subject to the entitlement adjustment for small refiners set forth in paragraph (e) of this section.

(2) Refiners to which entitlements shall be issued under this section shall include all refiners classified as refiner-buyers or refiner-sellers as of December 1, 1974 for purposes of § 211.65. Any refiner that is not so classified, or the refinery capacity of which is not certified by the FEA for purposes of § 211.65, shall apply to the FEA for certification of its refinery ca-

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pacity for purposes of qualifying to receive entitlements under this section. With respect to the granting of any such application for certification, the FEA shall consider the factors set forth in § 211.65(b)(v) and (vi).

(b) *Required purchases of entitlements by refiners.* For each month, commencing with the month of November 1974, each refiner that has been issued fewer entitlements for that month than the number of barrels of old oil included in its adjusted crude oil receipts shall purchase a number of entitlements effective for that month equal to the difference between the number of barrels of old oil included in that refiner's adjusted crude oil receipts for that month and the number of entitlements issued to and retained by that refiner. Entitlement purchases required under this paragraph (b) with respect to a particular month shall be effected by the close of the second month following that month.

(c) *Refiners and other firms with excess entitlements.* For each month, commencing with the month of November 1974, each refiner that has been issued a greater number of entitlements for that month than the number of barrels of old oil included in its adjusted crude oil receipts shall sell such excess entitlements and any eligible firm (other than a refiner) that has been issued entitlements shall sell such entitlements.

(d) *Adjustments to volume of crude oil runs to stills.*

(1) A refiner's volume of crude oil runs to stills shall (i) include (A) the volume of crude oil processed by another refiner for that refiner pursuant to a processing agreement and (B) the volume of crude oil processed by that refiner for a person other than a

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refiner pursuant to a processing agreement, and (ii) exclude the volume of crude oil processed by that refiner for another refiner pursuant to a processing agreement.

(2) The volume of a refiner's crude oil runs to stills for purposes of calculating its old oil supply ratio and the adjusted national old oil supply ratio shall be reduced by that refiner's volume of export sales in that month of refined petroleum products (except refined lubricating oils), including sales to a domestic purchaser which certifies the product is for export.

(3) The volume of a refiner's crude oil runs to stills in a particular month for purposes of calculating its old oil supply ratio and the adjusted national old oil supply ratio shall include the total number of barrels of plant condensate and the total number of barrels of synthetic crude oil made from tar sands which are imported from Canada and are utilized in that month as inputs to distillation units by a refiner, measured in accordance with the Bureau of Mines Form 6-1300-M. Neither plant condensate nor synthetic crude oil made from tar sands which are imported from Canada shall be eligible for inclusion in the volume of a refiner's crude oil runs to stills under this subparagraph (3) unless payment has been made in accordance with Presidential Proclamation No. 3279 of any import license fees applicable to crude oil as defined for purposes of this section, which is imported for refining.

(e) *Entitlement adjustment for small refiners.* In addition to the number of entitlements issuable under paragraph (a) of this section, each small refiner with a daily average volume of crude oil runs to stills of less than 175,000 barrels for a particular month shall be issued the following number of additional entitlements for each day of that month: (i) for each small refiner with a daily average volume of crude oil runs

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to stills of 100,000 to 175,000 barrels, 1,258 entitlements less the number of entitlements obtained by multiplying the difference between that small refiner's daily average volume of crude oil runs to stills (in thousands of barrels) and 100 by 16.7733; (ii) for each small refiner with a daily average volume of crude oil runs to stills of 30,000 to 100,000 barrels, 1,690 entitlements less the number of entitlements obtained by multiplying the difference between that small refiner's daily average volume of crude oil runs to stills (in thousands of barrels) and 30 by 6.1714; (iii) for each small refiner with a daily average volume of crude oil runs to stills of 10,000 to 30,000 barrels, 1,238 entitlements plus the number of entitlements obtained by multiplying the difference between that small refiner's daily average volume of crude oil runs to stills (in thousands of barrels) and 10 by 22.6; and (iv) for each small refiner with a daily average volume of crude oil runs to stills of zero to 10,000 barrels, 123.8 entitlements for each 1,000 barrels of that small refiner's daily average volume of crude oil runs to stills.

(f) *Transactions under § 211.65.* (1) Each sale by a refiner-seller under § 211.65 shall be deemed to include a volume of old oil proportionate to the volume of old oil included in the deliveries of crude oil to that refiner-seller that determine the price at which the sale is made under § 212.94 of part 212. Any volumes of old oil so included in any sale under § 211.65 shall be reflected in the crude oil receipts of the refiner-buyer concerned. As to each such sale, each refiner-seller shall certify to the refiner-buyer the volume of old oil included in the volume of crude oil sold within twenty-five (25) days following the month in which the crude oil is delivered to or for the account of the refiner-buyer in accordance with the provisions of § 212.131 of part 212.

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(2) In determining the weighted average price of all crude oil delivered to a refiner-seller in a month in the specified PAD District or Districts pursuant to § 212.94 of part 212, the cost of any required purchases or revenues from any sales of entitlements by that refiner-seller shall not be taken into account.

(g) *Exchanges of crude oil.* In any exchange of crude oil in which only quality and location differentials are given effect in the calculation of the exchange ratio, or in any matching purchase and sale transaction which has the same effect as such an exchange, no volumes of old oil shall be deemed to have been transferred. Any volumes of old oil delivered pursuant to any such exchange or transaction shall be considered as having been retained by the refiner that has exchanged away or sold such volume, regardless of the volume of crude oil received or purchased by that refiner in such an exchange or transaction.

(h) *Averaging of crude oil receipts.* Upon application by a refiner in accordance with the procedures established under Subpart G of Part 205 of this chapter within twenty (20) days following the close of a month, the FEA may adjust the crude oil receipts of that refiner for that month to permit the portion of such crude oil receipts specified by the FEA to be included in the crude oil receipts of that refiner for one or more subsequent months, if the volume of crude oil receipts in that month is significantly disproportionate to the volume of that refiner's crude oil runs to stills for that month due to shutdowns or other mechanical failures resulting in a fifty percent (50%) or greater portion of that refiner's refinery capacity not having been operable for the duration of that month.

(i) *Issuance and transfer of entitlements.* (1) The first month with respect to which entitlements shall be issued is November 1974. The entitlements for the

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month of November 1974 shall be issued by the FEA on January 10, 1975, pursuant to the notice specified in subparagraph (2) below. As to each month subsequent to November 1974, FEA shall issue entitlements pursuant to a notice published 40 days after the close of that month.

(2) Each notice published by the FEA evidencing the issuance of entitlements under this section shall specify as to a particular month the adjusted national old oil supply ratio, the name of each refiner and other eligible firm to which entitlements have been issued, the number of entitlements issued to each such refiner or other firm, the number of barrels of old oil included in each refiner's adjusted crude oil receipts and the price at which or price range within which entitlements shall be sold.

(3) No transfer of an entitlement shall be effective if made to (i) any person other than a refiner, or (ii) any refiner that is not purchasing such entitlement to fulfill such refiner's obligations under paragraph (b) of this section.

(4) The price at which entitlements shall be sold and purchased shall be fixed by the FEA for each month. Such price may be fixed in terms of a price range in which entitlement transactions shall be effected or in terms of a single price at which all entitlement transactions shall take place. Such price or price range shall be fixed by the FEA with reference to the differential between the weighted average costs to refiners of old oil and of new and released crude petroleum, imported crude oil and crude oil produced from stripper well leases.

(5) Refiners and eligible firms shall correct any errors contained in reports filed pursuant to paragraphs (h) and (j) of § 211.66 by filing an amended report for

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the particular month. Based on any reporting errors so corrected, FEA in its discretion may adjust entitlement issuances to the refiner or eligible firm in a month or months subsequent to the month in which the amended report is filed with the FEA, by issuing fewer entitlements than the number otherwise issuable or by requiring the refiner or eligible firm to purchase entitlements in order to correct for excess entitlements issued in a prior month or by issuing entitlements over and above the number otherwise issuable to compensate for too few entitlements having been issued in such prior month. Amended reports setting forth corrections which would result in adjustments favorable to a refiner or eligible firm shall be filed no later than the 28th day of the second month following the month in which the report being corrected is required to be filed. Refiners and eligible firms which seek corrections in their favor subsequent to the two month period allowed for filing amended reports may apply to FEA for an exception from the provisions of this subparagraph in accordance with the procedures established in subpart D of part 205 of this chapter. All entitlement issuances or purchase requirements shall give effect to any differential between the entitlement price for the month in which any correction is reflected as compared with the entitlement price for the month as to which the reporting error was made and such other factors as the FEA deems appropriate.

(6) Notwithstanding the provisions of paragraph (i) of § 211.66, eligible firms which failed to report any volumes of eligible products imported for the month of November or December, 1974 and which were otherwise eligible to receive entitlements in accordance with the provisions of this subpart in effect with respect to those months may report those volumes of eligible products on or before February 28, 1975. Any volumes so reported to the FEA shall be reflected, to the extent

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determined by FEA after consideration of such factors as it deems appropriate, in the entitlement issuances to those eligible firms either for the month of December 1974 (if the amended report reflecting the correction has been filed with the FEA by February 3, 1975) or for January 1975.

(j) *Failure to consummate transactions.* The FEA may direct refiners that have not purchased the required number of entitlements under paragraph (b) of this section for a particular month to purchase such required number of entitlements at a price specified by the FEA from any refiner or eligible firm that has entitlements for such month available for sale. The FEA may direct refiners or eligible firms that have entitlements available for sale to sell such entitlements at a price specified by the FEA to refiners that have not purchased their required number of entitlements under paragraph (b) of this section.

(k) *Certification of old oil by non-refiners.* Within twenty (20) days following each month, commencing with the month of November 1974, each person other than a refiner that has delivered crude oil to a refiner for processing for the account of such person pursuant to a processing agreement in that month shall certify to that refiner the volume of old oil contained in the crude oil so delivered to that refiner.

(l) *Adjustments to Crude Oil Costs.* (1) *Computations.* (i) *Entitlements purchased.* The cost of entitlements purchased in a particular month pursuant to this section by refiners shall be added to the cost of crude oil purchased or landed in that month (which is the period "t" (the month of measurement), for purposes of calculating the increased cost to be applied to product prices in the following month under the "A'" factor of the general formulae of § 212.82(c)(2) of this chapter); *provided, that,* to the extent that the obliga-

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tion of a refiner to purchase entitlements is reduced by volumes of crude oil processed by a refiner for a firm other than that refiner pursuant to a processing agreement, and that the monetary value of that reduced purchase obligation is used to reduce the processing fee otherwise payable by that firm under the processing agreement, or is otherwise passed on to that firm, such monetary value may also be added by that refiner to its cost of crude petroleum purchased or landed in that month, but shall be subtracted from the cost of crude oil purchased or landed in that month by the firm to which the monetary value of the reduced purchase obligation is passed on pursuant to this paragraph.

(ii) *Entitlements sold.* The sales revenues from entitlements sold in a particular month pursuant to this section by refiners shall be subtracted from the cost of crude oil purchased or landed in that month (which is the period "t" (the month of measurement), for purposes of calculating the increased costs to be applied to all product prices in the following month under the "A'" factor of the general formulae of § 212.83(e)(2) of this chapter); *provided, that,* to the extent that the sales revenues from entitlements which are issued for volumes of crude oil processed by a refiner for a firm other than that refiner pursuant to a processing agreement are used to reduce the processing fee otherwise payable by that firm under the processing agreement, or are otherwise passed on to that firm, such sales revenues shall not be subtracted by that refiner from its cost of crude petroleum purchased or landed in that month, but shall be subtracted from the cost of crude oil purchased or landed in that month by the firm to which the entitlement sales revenues are passed on pursuant to this paragraph.

(2) *Timing.* The date of purchase or sale of entitlements for purposes of determining the date on which a

cost or a cost reduction is incurred under § 212.83(c) of this chapter shall be the date on which the transaction is reported to have taken place on the monthly transaction report filed with the FEA under paragraph (i) of § 211.66.

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In the Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-1230

CITIES SERVICE COMPANY, ET AL., PETITIONERS

v.

FEDERAL ENERGY ADMINISTRATION, ET AL.

No. 75-1259

MARATHON OIL COMPANY, PETITIONER

v.

FEDERAL ENERGY ADMINISTRATION, ET AL.

ON PETITIONS FOR WRITS OF CERTIORARI TO THE TEMPORARY EMERGENCY COURT OF APPEALS OF THE UNITED STATES

BRIEF FOR THE FEDERAL RESPONDENTS IN OPPOSITION

OPINIONS BELOW

The opinion of the Temporary Emergency Court of Appeals in No. 75-1230 (Pet. App. 1a-23a)[1] is

[1] Unless otherwise specifically designated, all citations to "Pet. App." refer to the Appendix in No. 75-1230.

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reported at 529 F. 2d 1016. The findings of fact and conclusions of law of the district court (Pet. App. 24a-37a) are not reported.

Neither the *per curiam* opinion of the Temporary Emergency Court of Appeals in No. 75-1259 (Pet. No. 75-1259 App. 1a) nor the opinion of the district court (Pet. No. 75-1259 App. 3a-5a) is reported.

JURISDICTION

The judgment of the Temporary Emergency Court of Appeals in No. 75-1230 was entered on December 31, 1975, and a petition for rehearing with suggestion for rehearing *en banc* was denied on January 28, 1976. The petition for a writ of certiorari was filed on February 27, 1976.

The judgment of the Temporary Emergency Court of Appeals in No. 75-1259 was entered on February 17, 1976. The petition for a writ of certiorari was filed on March 5, 1976.

The jurisdiction of this Court is invoked under Section 5(a)(1) of the Emergency Petroleum Allocation Act of 1973, 87 Stat. 633, 15 U.S.C. (Supp. IV) 754(a)(1), which incorporates by reference Section 211(g) of the Economic Stabilization Act of 1970, 84 Stat. 799, as amended, and 28 U.S.C. 1254 (1).

QUESTIONS PRESENTED

1. Whether the Emergency Petroleum Allocation Act of 1973 authorized the Federal Energy Administration to adopt a program equalizing the crude oil costs of domestic refiners.

2. Whether the purchase from another private refiner of entitlements to refine price-controlled oil under the cost equalization program constitutes a taking of private property for a public purpose, without just compensation, in violation of the Fifth Amendment.

3. Whether the purchase of such entitlements constitutes payment of a tax imposed by an administrative agency, in violation of Article I, Section 8, Clause 1 of the Constitution.

STATUTES AND REGULATIONS INVOLVED

The relevant statutes and regulations are set forth at Pet. App. 39a-51a.

STATEMENT

In response to the nationwide petroleum shortages caused in part by inadequate domestic production and the Arab oil embargo, in the fall of 1973 Congress enacted the Emergency Petroleum Allocation Act of 1973 (the "Allocation Act"), 87 Stat. 627, 15 U.S.C. (Supp. IV) 751 *et seq.* The short-

ages were found to have created or be likely to create "severe economic dislocations and hardships," and Congress directed that the authority granted under the Allocation Act "shall be exercised for the purpose of minimizing the adverse impacts of such shortages or dislocations on * * * the domestic economy" (Section 2, 15 U.S.C. (Supp. IV) 751).

Section 4(a) of the Allocation Act, 15 U.S.C. (Supp. IV) 753(a), requires the President to promulgate regulations "providing for the mandatory allocation of crude oil, residual fuel oil, and each refined petroleum product, in amounts specified in * * * and at prices specified in * * * such regulation[s]." Section 4(b)(1) of the Act, 15 U.S.C. (Supp. IV) 753(b)(1), requires that these regulations must provide for the following statutory objectives, to the maximum extent practicable:

> (D) preservation of an economically sound and competitive petroleum industry; including the priority needs to restore and foster competition in the producing, refining, distribution, marketing, and petrochemical sectors of such industry, and to preserve the competitive viability of independent refiners, small refiners, nonbranded independent marketers, and branded independent marketers;
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> * * * * *
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> (F) equitable distribution of crude oil, residual fuel oil, and refined petroleum products at equitable prices among all regions and areas of the United States and sectors of the petroleum industry, including independent refiners, small

refiners, nonbranded independent marketers, branded independent marketers, and among all users;

* * * * *

(H) economic efficiency; and

(I) minimization of economic distortion, inflexibility, and unnecessary interference with market mechanisms.

To minimize the inflationary impact of rising world oil prices and to provide the necessary incentive for increased domestic production of petroleum, the so-called "two-tier" pricing system for crude oil was established (Pet. App. 4a-5a).[2] Under this system, "old" oil, that is, oil from properties producing at, or less than, their 1972 levels, cannot be sold at prices in excess of a ceiling level of approximately $5.25 per barrel, which is substantially below the open market price. "New" crude oil, which is the amount of domestic crude oil extracted from a property in excess of its 1972 base production control level, until

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[2] The two-tier pricing system originally was established by the Cost of Living Council as a part of Phase IV of the Economic Stabilization Program. 6 C.F.R. Part 150, Subpart L, 38 Fed. Reg. 22536. Pursuant to Section 5(b) of the Emergency Petroleum Allocation Act, 15 U.S.C. (Supp. IV) 754(b), the President established the Federal Energy Office ("F.E.O.") and delegated to it all his authority under that Act. Executive Order No. 11748, 38 Fed. Reg. 33575. The F.E.O. adopted the two-tier system without substantial change. 10 C.F.R. Part 212, Subpart D, 39 Fed. Reg. 1924. F.E.O. became the Federal Energy Administration ("F.E.A.") pursuant to the Federal Energy Administration Act of 1974, Pub. L. 93-275, 88 Stat. 97, 15 U.S.C. (Supp. IV) 761 *et seq.*

recently was permitted to be sold in the open market,[3] where it was subject to foreign competition but still commanded a substantial premium over the price of old oil (Pet. App. 26a-27a).[4] The validity of the two-tier pricing system was upheld in *Consumers Union of the United States, Inc.* v. *Sawhill*, 525 F. 2d 1068 (T.E.C.A.) (*en banc*), vacating 512 F. 2d 1112.

2. Pursuant to its statutory mandate, the Federal Energy Administration ("F.E.A.") promulgated a Mandatory Petroleum Allocation and Price Regulation (the "December 1 Rule"), 10 C.F.R. 211.63(a). It required the maintenance, for the duration of the

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[3] Until its recent modification, the upper tier of this pricing system consisted of three categories of domestic production, "new", "released", and "stripper" oil.

The price at which crude oil may be imported into this country is not regulated by the Allocation Act (Pet. App. 27a).

[4] Title IV of the Energy Policy and Conservation Act of 1975, Pub. L. 94-163, 89 Stat. 941, Sections 401 *et seq.* amended various provisions of the Allocation Act but, with the exception noted at pp. 18-19, *infra*, is not pertinent to this litigation.

Section 401 of that Act, 89 Stat. 941, amended Section 4(a) of the Allocation Act to require that F.E.A. establish ceiling prices applicable to any first sale of domestic crude oil to produce an initial weighted average first sale price not to exceed $7.66 per barrel. Under this formula, the initial average ceiling price for lower tier oil was estimated to be $5.25 per barrel and approximately $11.28 per barrel for upper tier oil. S. Conf. Rep. No. 94-516, 94th Cong., 1st Sess. 190 (1975); 41 Fed. Reg. 5111.

Section 461 of that Act, 89 Stat. 955, extended the mandatory aspects of F.E.A.'s authority under the Allocation Act for forty months, with standby authority to continue until September 30, 1981.

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regulatory program, of supplier-purchaser relationships in effect on December 1, 1973, under contracts for sales, purchases and exchanges of domestic crude oil. This regulation stabilized the nation's crude oil distribution system and precluded vertically integrated refiners from shifting their own crude oil production to their own refineries and thereby severing the historic access of nonintegrated refiners to domestic crude oil supplies. The constitutionality of this regulation was upheld in *Condor Operating Co.* v. *Sawhill*, 514 F. 2d 351 (T.E.C.A.), certiorari denied, 421 U.S. 976.

To assure further that "small" and "independent" refiners (as those terms are defined in Section 3(3) and (4), 15 U.S.C. (Supp. IV) 752(3) and (4)) had adequate access to crude oil supplies during the period of shortage, F.E.A. also adopted a Mandatory Crude Oil Sales regulation (the "buy/sell program"). 10 C.F.R. 211.65. It entitles those refiners to purchase petroleum from the 15 largest domestic refiners in sufficient quantity to obtain volumes of crude oil not less than the volumes obtained in 1972. Since oil transferred under the buy/sell program was until recently sold at the vendor's weighted average price for all its crude oil, the purchasers obtained some advantage from the lower, controlled price of old oil to the extent that the sellers had greater access to it.

The December 1 Rule and the buy/sell program guaranteed small and independent refiners access to minimum crude oil supplies. However, these regulations had little effect upon the disparity in the costs

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of raw materials the two-tier pricing system had created between refiners with access to price-controlled old oil and refiners dependent upon market-priced domestic or foreign oil for the bulk of their supply. During the May 1973 base period, the composite crude oil costs of all refiners were approximately equal. But as a result of the implementation of the two-tier system, the major integrated oil companies, which as a class had far greater access to "old" oil, had significantly lower composite crude oil costs than the small and independent refiners (Pet. App. 5a n. 6, 27a-28a). See *Pasco, Inc.* v. *Federal Energy Administration*, 525 F. 2d 1391, 1395 (T.E.C.A.).

The prices charged by refiners for finished products necessarily reflected the differential in raw materials prices.[5] With the availability of adequate supplies upon the lifting of the Arab oil embargo and the renewed significance of price competition, refiners which were disproportionately reliant upon crude oil sold at open market prices were at a competitive disadvantage and were forced to absorb a portion of their increased raw materials costs or suffer a reduction in their market share (Pet. App. 5a, 27a-28a). F.E.A. found that the refiners' unequal access to price-controlled oil had interfered with market mechanisms, weakened the competitive viability of the small and independent sectors of the petroleum in-

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[5] Section 4(b)(2)(A) of the Allocation Act, 15 U.S.C. (Supp. IV) 753(b)(2)(A), required that F.E.A.'s petroleum price regulations provide for a dollar-for-dollar pass-through of net increases in crude oil costs to marketers or retailers.

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dustry, and produced inter-regional price differentials for some refined petroleum products, in contravention of the congressional intention expressed in the Allocation Act (*ibid.*). 39 Fed. Reg. 39740; see *Pasco, Inc.* v. *Federal Energy Administration*, *supra*, 525 F. 2d at 1395.

In order to allocate equitably the benefits of price-controlled old oil (whose scarcity value the two-tier system artificially created) among all segments of the petroleum industry, all regions of the country, and all users of petroleum products, while retaining the inflation dampening and domestic production incentive aspects of the two-tier system, F.E.A. adopted the Cost Equalization Program, 10 C.F.R. 211.67, which petitioners challenge (Pet. App. 6a). Under this program, each refiner must possess one "entitlement" for each barrel of old oil which it refines during any month. F.E.A. initially issues each refiner the number of entitlements equal to its proportionate share of all the old oil refined in the United States during that month.[6]

A refiner which processes more than its proportionate share of the national old oil supply in any month must purchase additional entitlements from a refiner which processed less than its proportionate share of price-controlled oil. F.E.A. establishes the

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[6] The entitlements program favors small refiners, by providing this class with additional entitlements in order to strengthen their economic viability. 10 C.F.R. 211.67(e). Petitioners do not specifically challenge this aspect of the oil entitlements program.

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price of the entitlement on a monthly basis in an amount equal to the approximate difference between the weighted average prices charged for old oil and upper tier or higher-priced crude oil.[7] 10 C.F.R. 211.67(i)(4). Refiners who sell entitlements are required to reduce their raw materials costs by the amount of entitlement sales proceeds for cost pass-through purposes, and purchasers of entitlements are allowed to include the cost of entitlements in their crude oil costs. *Id.* at 211.67(*l*).

The combined effect of the entitlements program and the cost pass-through regulations is to eliminate the inequities created by the two-tier pricing system and substantially to equalize the average weighted crude oil costs of all refiners (Pet. App. 7a).[8] See *Pasco, Inc.* v. *Federal Energy Administration, supra,* 525 F. 2d at 1395.

3. Each month since the inception of the entitlements program, petitioners in No. 75-1230 have processed more than a proportionate share of the national old oil supply and have been required to purchase additional entitlements from other refiners (Pet. No. 75-1230, pp. 9-10; Pet. App. 30a).

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[7] The price of an entitlement was initially $5.00 in January 1975 and was $8.09 in January 1976.

[8] The Cost Equalization Program does not, and was not intended to, equalize fully all crude oil costs. For example, the historic disparities in crude oil costs caused by quality and transportation differentials are not affected by this program. The only disparity in crude oil costs equalized by the program is the price differential artificially created by the two-tier pricing system.

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Petitioners instituted this action in the United States District Court for the District of Columbia seeking declaratory and injunctive relief against operation of the Cost Equalization Program. The complaint alleged that the Cost Equalization Program exceeded F.E.A.'s authority under the Allocation Act and was unconstitutional as an administratively imposed tax and a taking of private property for a public purpose, without just compensation.

The district court consolidated the hearing on petitioners' motion for a preliminary injunction with the hearing on the merits and entered judgment for respondents. It held that the Cost Equalization Program was a valid exercise of F.E.A.'s allocation authority under Section 4(a) of the Allocation Act (Pet. App. 32a). Furthermore, it noted that both Houses of Congress had approved F.E.A.'s implementation of a Cost Equalization Program without amendment of Section 4(a) at the time they extended the Act (Pet. App. 33a). It concluded that the conjunction of the entitlements program's allocation of old oil and F.E.A.'s cost pass-through regulations constituted a rational attempt, in conformity with the congressional intention, to eliminate the inequities caused by the two-tier pricing system (Pet. App. 34a). It also held insubstantial petitioners' constitutional challenges (Pet. App. 35a-37a).

The Temporary Emergency Court of Appeals affirmed (Pet. App. 1a-23a). Considering F.E.A.'s authority under Section 4(a) to allocate crude oil and specify its price together with the objectives

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sought to be achieved specified in Section 4(b), the court held the "Entitlements Program * * * clearly within the authority conferred on [F.E.A.] under the Allocation Act" (Pet. App. 9a-10a). The court also found that the entitlements program did not, even incidentally, raise any revenue for the government or its general support and therefore concluded that it did not constitute a tax within the meaning of Article I, Section 8, Clause 1 of the Constitution (Pet. App. 22a). Finally, it held that the Cost Equalization Program was not an appropriation of petitioners' property by the government but was a legitimate exercise of the government's admitted power to regulate the allocation of oil, and that the fact that the effect of the program was to limit petitioners' ability to realize the greatest possible profit on the disposition of that property did not make it a taking of their property in violation of the Fifth Amendment (Pet. App. 15a, 19a-20a).

4. Petitioner in No. 75-1259 instituted this action in the United States District Court for the Northern District of Ohio seeking injunctive relief against operation of the Cost Equalization Program, and specifically from having to purchase $11.6 million in entitlements. The complaint alleged that the entitlements program exceeded F.E.A.'s authority under the Allocation Act and that it violated the Fifth Amendment by effecting a taking of petitioner's property for a private, rather than a public purpose, and without just compensation.

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The district court consolidated the hearing on petitioner's motion for a preliminary injunction with the trial on the merits and dismissed the complaint (Pet. No. 75-1259 App. 3a-5a). The court also refused to certify the constitutional question for appeal.[9]

The Temporary Emergency Court of Appeals affirmed, on the ground that its prior decisions in *Pasco, Inc.* v. *Federal Energy Administration*, *supra*, and *Cities Service* were "dispositive as against all of the contentions of [petitioner]" (Pet. No. 75-1259 App. 1a).

ARGUMENT

In essence, petitioners contend that the Cost Equalization Program does not effectuate an "allocation" of crude oil, as that term is used in Section 4(a) of the Allocation Act, but constitutes a direct subsidy of less competitive refiners (Pet. No. 75-1230, pp. 10-12; Pet. No. 75-1259, p. 9). They argue that the program exceeds F.E.A.'s authority under the Allocation Act and is, in any event, unconstitutional. These arguments have been carefully considered and rejected in a series of cases by the Temporary Emer-

[9] The district court previously had denied similar motions by petitioner for a preliminary injunction against operation of the entitlements program and for certification of the constitutional question (Pet. No. 75-1259 App. 27a-45a). The Temporary Emergency Court of Appeals dismissed petitioner's appeal from that order for lack of jurisdiction. *Marathon Oil Co.* v. *Federal Energy Administration*, 516 F. 2d 1397.

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gency Court of Appeals, which has exclusive jurisdiction to consider challenges to the validity and constitutionality of regulations issued under the Allocation Act. Section 5(a)(1), 15 U.S.C. (Supp. IV) 754 (a)(1), which incorporates by reference Sections 211(b)(2) and (c) of the Economic Stabilization Act of 1970, 85 Stat. 749, as amended, 12 U.S.C. (Supp. IV) 1904 note.

In the exercise of its special familiarity with the provisions and legislative history of the Act, that court has concluded that the entitlements program is an allocation mechanism "clearly within" F.E.A.'s statutory authority (Pet. App. 9a-10a) and therefore has rejected the correlative constitutional arguments. There is no conflict of decisions among the courts of appeals on these questions, and the decisions of the Temporary Emergency Court of Appeals do not conflict with any decisions of this Court. Further review is not warranted.

1. Petitioners contend (Pet. No. 75-1230, p. 17; Pet. No. 75-1259, pp. 14-15) that F.E.A. lacked authority under the Allocation Act to promulgate the Cost Equalization Program. They claim that the entitlements program does not allocate crude oil among refiners or regulate its price, as the statute authorizes, but requires refiners to pay cash subsidies to less efficient competitors.

However, payments under the Cost Equalization Program are in no sense a subsidy—no refiner is required to transfer to another person property to which it is otherwise lawfully entitled. Rather, to further other objectives of the Allocation Act, the

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government by regulation fixed the sales price of one component of crude oil production, designated "old" oil, substantially below the open market level. Refiners which fortuitously had access to that petroleum would have received a windfall profit, in the absence of a countervailing government regulation. The price-control regulation granted those refiners no cognizable property right that entitled them to enjoy that price differential. The Cost Equalization Program simply regulates, on an equitable basis, the access of domestic refiners to that crude oil whose price the government has set below its market value (Pet. App. 5a-6a, 22a).

The broad grant of power to the President under the Allocation Act authorized F.E.A. to allocate this government-created benefit through the entitlements program. Section 4(a) requires that the President provide for "the mandatory allocation of crude oil * * * in amounts * * * and at prices specified in" appropriate regulations. The Conference Committee Report on the Allocation Act stated: "The President is intended to have full flexibility in devising the most effective and efficient means of meeting the priority needs of the American people * * *." H.R. Conf. Rep. No. 93-628, 93d Cong., 1st Sess. 12 (1973). Thus, Section 4(a) would permit F.E.A. to ameliorate the disparities created by the two-tier pricing system through the physical allocation of old oil and

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new oil among domestic refiners at regulated prices.[10] Congress pointed out that "[i]t is specifically intended that the allocation program operate at the refinery level to compel inter-refinery transfers and exchanges of crude oil." H.R. Conf. Rep. No. 93-628, *supra*, at 22.

Ordering the physical transfer of oil, however, would have disrupted existing market mechanisms, and imposed enormous administrative burdens on both the refiners and the government, while the additional transportation costs would have greatly increased the price of crude oil. 39 Fed. Reg. 31650. Moreover, there is no physical justification for such transfers, since "old" oil and "new" oil are chemically fungible; their sole distinguishing characteristic is the lower price of the former resulting from price controls.

F.E.A. therefore created a paper unit of account, the "entitlement," and required that it be transferred instead of the oil it represents. Each entitlement corresponds to one barrel of old oil. Its sale effectuates the same result as the physical exchange of one barrel of old oil, plus the equalization fee, for a barrel of new oil, but without incurring additional distribution costs. Thus, the entitlements program

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[10] Contrary to the assertion of petitioners in No. 75-1230 (Pet. 19-20), under a system of actual transfer of lower priced oil to some refiners, if they had refined and sold excess quantities of price-controlled oil in any month, they would be obligated to purchase sufficient quantities of uncontrolled oil to rectify the discrepancy.

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cheaply and efficiently produces an allocation of crude oil at regulated prices. The Temporary Emergency Court of Appeals correctly held that F.E.A. had authority under the Allocation Act to adopt it. See *Pasco, Inc.* v. *Federal Energy Administration*, *supra*, 525 F. 2d at 1402.

Moreover, in extending the Allocation Act beyond its original expiration date, both Houses of Congress noted that they had refrained from explicitly requiring that F.E.A. adopt a Cost Equalization Program only because F.E.A. had announced that it intended to promulgate such a system under its existing authority. The Senate Committee Report stated (S. Rep. No. 93-1082, 93d Cong., 2d Sess. 2 (1974)):

> [The Allocation Act] provides ample authority for the FEA to institute a system of price equalization to provide that all segments of the industry benefit from lower-priced domestic oil. The Committee was urged to amend the Act to achieve this objective but has been assured that the FEA intends to institute a price equalization program under existing authority in the immediate future.

Similarly the House Report recognized F.E.A.'s authority to institute a cost equalization plan (H.R. Rep. No. 93-1443, 93d Cong., 2d Sess. 3 (1974)):

> Moreover, the Act includes adequate authority to permit the FEA to institute a system of price equalization applicable to crude oil, residual fuel oil and refined products to eliminate the

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> regional and competitive inequities which result from a dependence upon high-cost imported oils and petroleum products. The FEA's stated commitment to Subcommittee Chairman Macdonald during the hearings on this bill to move promptly on a price equalization program has convinced the Committee that specific amendments to the Act to compel such action may prove to be unnecessary.

See *Id.* at 7 (Statement of John C. Sawhill, Administrator, Federal Energy Administration). As the court below observed (Pet. App. 10a-11a n. 10), these statements of congressional intent, contemporaneous with the first extension of the Act in 1974, confirm that the Allocation Act has, from the date of its enactment, authorized the entitlements program.[11]

Finally, the enactment of Section 403(a) of the Energy Policy and Conservation Act of 1975, Pub. L. 94-163, 89 Stat. 948, shows that Congress recognized that F.E.A. had authority to adopt an entitlements plan. In requiring that any regulation promulgated under Section 4(a) "which requires the purchase of entitlements" contain specific provisions to

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[11] Congress has been fully informed of the operation of the entitlements program, see Hearings on Energy Conservation and Oil Policy before the House Subcommittee on Energy and Power, Committee on Interstate and Foreign Commerce, Ser. No. 94-17, 94th Cong., 1st Sess. 459 (1975); Hearings on Oversight-Federal Energy Administration Programs before the Senate Committee on Interior and Insular Affairs, Ser. No. 94-16, 94th Cong., 1st Sess. 525 (1975), and extended the Act on three occasions without modification of the relevant language of Section 4(a). Pub. L. 93-511, 88 Stat. 1608; Pub. L. 94-99, 89 Stat. 481; Pub. L. 94-133, 89 Stat. 694.

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protect the small entitlements purchaser, Congress explicitly acknowledged the existence of an equalization program as a constituent of the national energy regulation plan.[12] See Section 455 of the Energy Policy and Conservation Act, Pub. L. 94-163, 89 Stat. 952.

2. Petitioners contend (Pet. No. 75-1230, p. 15; Pet. No. 75-1259, p. 8) that the mandatory purchase of entitlements constitutes the taking of private property for public use without just compensation, in violation of the Fifth Amendment.[13]

As discussed at pp. 14-15, *supra*, however, these payments constitute the mechanism for equitable dis-

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[12] Petitioner in No. 75-1259 erroneously suggests (Pet. 14-15) that the decision below conflicts with *Algonquin SNG, Inc.* v. *Federal Energy Administration*, 518 F. 2d 1051 (C.A.D.C.), certiorari granted, 423 U.S. 923, argued April 20, 1976 (No. 75-382). The question in that case is whether the President is authorized to adjust imports of oil by imposition of a system of license fees under Section 232(b) of the Trade Expansion Act of 1962, 76 Stat. 877, as amended, 19 U.S.C. (Supp. IV) 1862(b). The authority of the President to impose such fees under that different statute is irrelevant to any issue in these cases.

Petitioner's reliance (Pet. 15) on *Shell Oil Co.* v. *Federal Energy Administration*, 527 F.2d 1243 (T.E.C.A.), is similarly misplaced. The court there held that F.E.A.'s, authority to regulate the price of petroleum products did not empower it to continue regulation of gas station rentals upon the expiration of wage-price controls.

[13] As the district court noted in *Cities Service* (Pet. App. 36a-37a), all of the district courts that have considered a similar Fifth Amendment challenge to the Cost Equalization Program have considered it insubstantial and have refused to certify it for appeal to the Temporary Emergency Court of Appeals.

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tribution of the benefits conferred by government imposition of price controls on old oil; they do not represent a subsidy of the sellers of entitlements. Moreover, the property interest petitioners assert is no more than an unilateral expectation that the government would not withdraw the benefit it previously had extended to those with access to old oil by later amending its petroleum allocation regulations to eliminate their anticipated windfall. This mere expectancy is not a compensable interest under the Fifth Amendment. See *Louisville Bridge Co.* v. *United States*, 242 U.S. 409.[14]

In any event, as the court below properly pointed out (Pet. App. 15a), consequential injuries resulting from the exercise of lawful administrative authority are not compensable under the Fifth Amendment. See *Knox* v. *Lee*, 12 Wall. 457, 551. The constitutionality of petroleum allocation regulations that have the incidental effect of limiting the price at which a refiner may dispose of its crude oil was established in *Condor Operating Co.* v. *Sawhill*, 514 F.2d 351 (T.E.C.A.), certiorari denied, 421 U.S. 976. Here, as part of its overall emergency program to alleviate the inflationary increase in petroleum prices and limit dependency on foreign oil production, the government has instituted allocation and price controls

[14] Since the entitlements program gives rise to no compensable taking within the meaning of the Fifth Amendment, the argument of petitioner in No. 75-1259 (Pet. 13-14) that the mandatory purchase of entitlements constitutes a taking for a private, rather than a public, purpose is irrelevant.

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that have the derivative effect of limiting the profitability of petitioners' sales of old oil.[15] The court below correctly held (Pet. App. 20a):

> The fact that [petitioners in No. 75-1230] cannot now capitalize upon these events and refine its own much lower priced oil at will and thereby gain a larger market share or even higher profit margins does not render the program unconstitutional.

See also, *Block* v. *Hirsch*, 256 U.S. 135.[16]

As the Temporary Emergency Court of Appeals observed (Pet. App. 21a n. 20), this Court has held that a comparable milk price equalization pooling program, instituted under the Agricultural Marketing Agreement Act of 1937, 50 Stat. 246, 7 U.S.C. 601, did not deprive persons required to make payments into the equalization fund of their property in violation of the Fifth Amendment. *United States*

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[15] Contrary to the assertion of petitioner in No. 75-1259 (Pet. 11), the fact that Congress recently has extended the effectiveness of petroleum allocation regulations for forty months in no way detracts from the emergency nature of the problems which those regulations address, although they may differ to some extent from the problems in existence at the time the Allocation Act first was enacted. S. Conf. Rep. No. 94-516, *supra*, at 204.

[16] Petitioners also contend (Pet. No. 75-1230, p. 17; Pet. No. 75-1259, p. 13) that the entitlements program constitutes a taking without compensation to the extent that their entitlement purchase costs are not passed through to their customers. However, as the Temporary Emergency Court of Appeals noted (Pet. App. 11a-12a), petitioners' election not to take full advantage of the pass-through regulation in order to have a competitive advantage reflects their business judgment rather than governmental compulsion.

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v. *Rock Royal Co-Operative, Inc.*, 307 U.S. 533, 571-573. That program required handlers which sold milk for the most profitable end uses to pay money through a pooling arrangement to handlers which sold milk for less profitable uses. Under the regulation, all milk producers ultimately received a uniform price for all milk sold to handlers. That price equalization regulation, as amended, subsequently has been held applicable to sales of both milk handlers purchase from others and milk they produce themselves. *Ideal Farms, Inc.* v. *Benson*, 288 F. 2d 608 (C.A. 3), certiorari denied, 372 U.S. 965; see *Freeman* v. *Vance*, 319 F. 2d 841 (C.A. 5). Those decisions strongly support the constitutionality of the instant Cost Equalization Program.

3. Petitioners in No. 75-1230 contend (Pet. 11) that the Cost Equalization payments constitute a tax imposed by an administrative agency, in violation of Article I, Section 8, Clause 1 of the Constitution. Their argument rests on the assumption that entitlement payments are direct subsidies of other refiners for a public purpose, and is fully answered at pp. 14-15, *supra*.

Furthermore, as the court below properly held (Pet. App. 22a), a regulatory requirement does not constitute a tax within the meaning of the Constitution unless its real purpose and effect is to raise revenues for the general support of the government. See the *Head Money Cases*, 112 U.S. 580, 595; *United States* v. *Butler*, 297 U.S. 1, 61; *Moon* v. *Freeman*, 379 F. 2d 382, 391 (C.A. 9); *Rodgers* v. *United*

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States, 138 F. 2d 992, 994 (C.A. 6). Since the Cost Equalization Program produces no revenue for the government, payments for entitlements are not a tax (Pet. App. 22a-23a).

CONCLUSION

For the foregoing reasons, the petitions for writs of certiorari should be denied.

Respectfully submitted.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-1230

CITIES SERVICE COMPANY
CITIES SERVICE OIL COMPANY,
Petitioners,

v.

FEDERAL ENERGY ADMINISTRATION
FRANK G. ZARB, ADMINISTRATOR,
Respondents.

On Petition for a Writ of Certiorari to the Temporary Emergency Court of Appeals of the United States

REPLY BRIEF FOR PETITIONERS

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-1230

CITIES SERVICE COMPANY
CITIES SERVICE OIL COMPANY,
Petitioners,

v.

FEDERAL ENERGY ADMINISTRATION
FRANK G. ZARB, ADMINISTRATOR,
Respondents.

On Petition for a Writ of Certiorari to the Temporary Emergency Court of Appeals of the United States

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REPLY BRIEF FOR PETITIONERS

This reply is submitted (I) to point up the failure of the government to come to grips with the constitutional and statutory issues raised, and (II) to draw the Court's attention to recent amendments by respondents to the Cost Equalization Program (CEP) which demonstrate that the CEP constitutes an administrative subsidy program.

I

Respondents assert that the two-tier system of crude oil pricing, established by them "to minimize the inflationary impact of rising world oil prices," fortuitously confers a benefit on petitioners and therefore, it is argued, the benefit may be withdrawn by forcing petitioners to transfer cash funds directly to other refiners. Brief in Opposition, pp. 5, 15. The government-created benefit is described as fixing the sale price of "old" oil substantially below the market level. Brief in Opposition, p. 15. The government fails to mention that petitioners own substantial production of crude oil which is denominated "old" oil.[1] The "benefit" thus bestowed on petitioners is that they are not permitted to sell or transfer such crude oil at the higher price permitted in sales of "new" oil. While petitioners do not here challenge the two-tier pricing regulation, petitioners do indeed challenge the government's bland assertion that the scheme bestows a benefit on an integrated company such as petitioners. The government views petitioner only as a refiner and refuses to consider it as a producer.

The government fails also to meet the critical issue of forced purchase. The government asserts that it could have mandated petitioners to sell "old" oil at the lower price to other refiners who would in turn sell their higher priced oil to petitioners. According to the government, section 4(a) of the Emergency Petroleum Allocation Act would have permitted "the physical allocation of old oil and new oil among domestic re-

[1] The record below indicates that petitioners own substantial quantities of "old" oil not because of fortuity but because petitioners have historically concentrated their expenditures in the search for and development of domestic petroleum.

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finers at regulated prices." Brief in Opposition, pp. 15-16. Since physical transfer would have been disruptive and costly, Respondents chose instead to require the transfer of entitlements instead of the oil it represents. The difficulty with the foregoing is that the government's premise is only half true. Assuming that respondents could mandate purchase opportunities of old or new crude oil at regulated prices, no authority exists to compel anyone to purchase. Completely ignored by the government are respondents' administrative decisions which have consistently held that any purchaser may decline to purchase an allocated product from any supplier. *See State of New Hampshire,* 2 FEA ¶ 80,574 (April 16, 1975) CCH Fed. Energy Guidelines; *Jacksonville Electric Authority,* 2 FEA ¶ 80,553 (March 21, 1975); *Swann Oil, Inc.,* 2 FEA ¶ 80,505 (January 9, 1975); *Better Home Heat Council, Inc.,* as modified, CCH Fed. Energy Guidelines, Par. 20,131 (July 24, 1974).

The government's treatment of the Fifth Amendment "taking" issue also glosses over the essential question, *viz.,* whether the government may take property from one person and bestow it directly upon another. Here the government attempts to muffle the operation of the CEP by characterizing its requirement for direct cash transfer as "limiting the profitability of petitioners' sales of old oil" and as the withdrawal of a "mere expectancy." Brief in Opposition, pp. 21, 20. While price regulation during periods of emergency which restricts the most profitable use of property has been upheld, it is difficult to fathom how a forced transfer of cash funds directly to another refiner can be called a mere restriction on the most profitable use of the funds. Indeed, upon transfer the funds are no longer in possession and, if the program be

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valid, there exists no claim over against the recipient. The Fifth Amendment contains twelve words which impose a restraint on the power of eminent domain. If that bedrock provision is so enfeebled as to impose no constraint on the CEP, the way is clear for the government to make wider use of the mechanism of forced cash payments to equalize what may be deemed to be conditions of inequality.

II

Petitioners contend also that the CEP, in violation of the Fifth Amendment and Article I, Section 8, Clause 1 which reserves to Congress the taxing power, constitutes the raising of revenue by an administrative agency in order to fund a subsidy to certain segments of the petroleum industry. Since filing of petition in this proceeding the CEP has been amended by respondents to promote the following interests.

By regulation issued March 29, 1976, respondents amended the CEP so as to permit firms importing residual fuel oil from foreign refiners into the East Coast to receive cash payments from persons such as petitioners. 41 Fed. Reg. 13899 et seq. (April 1, 1976). Respondents' stated purpose for this amendment is that "FEA has concluded that mitigation of the competitive imbalance which exists in the East Coast residual fuel oil market is definitely necessary." 41 Fed. Reg. at 13899.

By regulation issued May 12, 1976, respondents amended the CEP so as to provide additional entitlements to small refiners, the effect of which is to decrease the number of entitlements issued to petitioners and thereby increase their cash payments. 41 Fed. Reg. 20392 et seq. (May 18, 1976). Respondents' stated purpose for this small refiner bias amendment is that FEA has received numerous indications that many small re-

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finers are "in need of additional bias amounts to remain competitive and financially viable. Many operating and other costs for these firms have increased since 1972 . . . ." 41 Fed. Reg. at 20392.

By notice of proposed rulemaking issued May 25, 1976, respondents propose to amend the CEP so as to permit firms importing naphtha into Puerto Rico to receive entitlements, as if the naphtha were crude oil, and thus receive cash payments from persons such as petitioners. 41 Fed. Reg. 21936 et seq. (May 28, 1976). Respondents' stated purpose for the proposed amendment is "to alleviate the unique competitive disadvantages for Puerto Rico based companies and to recognize the pre-existing United States policy encouraging the construction of petro-chemical facilities in Puerto Rico." 41 Fed. Reg. at 21937.

All of the foregoing may be worthy and laudable purposes but the question is whether petitioners may be required to fund these goals or whether the expense should be borne by the General Fund.

Respectfully submitted,

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Dated: June 3, 1976

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